United Nations

Report of the International Law Commission

Sixty-ninth session
(1 May-2 June and 3 July-4 August 2017)

General Assembly
Official Records
Seventy-second Session
Supplement No. 10 (A/72/10)

Please recycle

General Assembly
Official Records
Seventy-second Session
Supplement No. 10

Report of the International Law Commission

Sixty-ninth session
(1 May-2 June and 3 July-4 August 2017)

United Nations • New York, 2017

Note

Symbols of United Nations documents are composed of capital letters combined with figures. Mention of such a symbol indicates a reference to a United Nations document.

The word *Yearbook* followed by suspension points and the year (e.g. *Yearbook ... 1971*) indicates a reference to the *Yearbook of the International Law Commission*.

A typeset version of the report of the Commission will be included in Part Two of volume II of the *Yearbook of the International Law Commission 2017*.

ISSN 0251-822X

Summary of contents

Chapter		*Page*
I.	Introduction	1
II.	Summary of the work of the Commission at its sixty-ninth session	5
III.	Specific issues on which comments would be of particular interest to the Commission	7
IV.	Crimes against humanity	9
V.	Provisional application of treaties	128
VI.	Protection of the atmosphere	147
VII.	Immunity of State officials from foreign criminal jurisdiction	163
VIII.	Peremptory norms of general international law (*jus cogens*)	192
IX.	Succession of States in respect of State responsibility	203
X.	Protection of the environment in relation to armed conflicts	211
XI.	Other decisions and conclusions of the Commission	213

Contents

Chapter *Page*

I. Introduction 1

A. Membership 1

B. Officers and the Enlarged Bureau 2

C. Drafting Committee 2

D. Working Groups 3

E. Secretariat 4

F. Agenda 4

II. Summary of the work of the Commission at its sixty-ninth session 5

III. Specific issues on which comments would be of particular interest to the Commission 7

A. Immunity of State officials from foreign criminal jurisdiction 7

B. Succession of States in respect of State responsibility 7

C. New topics 7

IV. Crimes against humanity 9

A. Introduction 9

B. Consideration of the topic at the present session 9

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading 10

1. Text of the draft articles 10

2. Text of the draft articles and commentaries thereto 21

General commentary 21

Preamble 22

Commentary 23

Article 1 Scope 24

Commentary 24

Article 2 General obligation 25

Commentary 25

Article 3 Definition of crimes against humanity 28

Commentary 29

Article 4 Obligation of prevention 45

Commentary 45

Article 5 *Non-refoulement* 55

Commentary 55

Article 6 Criminalization under national law 59

Commentary 60

Article 7 Establishment of national jurisdiction 76

Commentary 77

Article 8 Investigation 79

Commentary 80

Article 9 Preliminary measures when an alleged offender is present 81

Commentary 82

Article 10 *Aut dedere aut judicare* 83

Commentary 83

Article 11 Fair treatment of the alleged offender... 88

Commentary 89

Article 12 Victims, witnesses and others.. 92

Commentary 92

Article 13 Extradition 98

Commentary 99

Article 14 Mutual legal assistance.. 109

Commentary 110

Article 15 Settlement of disputes.. 116

Commentary 116

Annex 118

Commentary 121

V. Provisional application of treaties 128

A. Introduction 128

B. Consideration of the topic at the present session 128

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission... 129

1. Text of the draft guidelines 129

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session.. 130

General commentary 130

Guideline 1 Scope 132

Commentary 132

Guideline 2 Purpose 133

Commentary 133

Guideline 3 General rule 133

Commentary 133

Guideline 4 Form of agreement... 136

Commentary 136

Guideline 5 Commencement of provisional application 138

Commentary 138

Guideline 6 Legal effects of provisional application.. 139

Commentary 139

Guideline 7 Responsibility for breach... 140

Commentary 140

Guideline 8 Termination upon notification of intention not to become a party 141

Commentary 141

Guideline 9 Internal law of States or rules of international organizations and observance of provisionally applied treaties 143

Commentary 143

Guideline 10 Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties 144

Commentary 145

Guideline 11 Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations 145

Commentary 146

VI. Protection of the atmosphere 147

A. Introduction 147

B. Consideration of the topic at the present session 147

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission 148

1. Text of the draft guidelines, together with preambular paragraphs 148

2. Text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session 151

Preamble 151

Commentary 151

Guideline 9 Interrelationship among relevant rules 155

Commentary 155

VII. Immunity of State officials from foreign criminal jurisdiction 163

A. Introduction 163

B. Consideration of the topic at the present session 163

1. Introduction by the Special Rapporteur of the fifth report 165

2. Summary of the debate 167

(a) General comments 167

(b) Specific comments on draft article 7 171

(c) Future work 173

3. Concluding remarks of the Special Rapporteur 173

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission 175

1. Text of the draft articles 175

2. Text of the draft article, with commentary thereto, provisionally adopted by the Commission at its sixty-ninth session 177

VIII. Peremptory norms of general international law (*jus cogens*) 192

A. Introduction 192

B. Consideration of the topic at the present session 192

1. Introduction by the Special Rapporteur of the second report 194

2. Summary of the debate 195
(a) General comments 195
(b) Specific comments on the draft conclusions 198
3. Concluding remarks of the Special Rapporteur 200
IX. Succession of States in respect of State responsibility 203
A. Introduction 203
B. Consideration of the topic at the present session 203
1. Introduction by the Special Rapporteur of the first report 203
2. Summary of the debate 206
(a) General comments 206
(b) Specific comments 208
(c) Final form 209
(d) Future programme of work 209
3. Concluding remarks of the Special Rapporteur 210
X. Protection of the environment in relation to armed conflicts 211
A. Introduction 211
B. Consideration of the topic at the present session 211
XI. Other decisions and conclusions of the Commission 213
A. Succession of States in respect of State responsibility 213
B. Programme, procedures and working methods of the Commission and its documentation 213
1. Working Group on the Long-term Programme of Work 213
2. Work programme of the Commission for the remainder of the quinquennium 213
(a) Immunity of State officials from foreign criminal jurisdiction 214
(b) Subsequent agreements and subsequent practice in relation to the interpretation of treaties 214
(c) Provisional application of treaties 214
(d) Identification of customary international law 214
(e) Protection of the environment in relation to armed conflicts 214
(f) Protection of the atmosphere 215
(g) Crimes against humanity 215
(h) Peremptory norms of general international law (*jus cogens*) 215
(i) Succession of States in respect of State responsibility 215
3. Consideration of General Assembly resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels 216
4. Seventieth anniversary session of the International Law Commission 217
5. Honoraria 218
6. Working Group on methods of work of the Commission 218
7. Documentation and publications 218
8. *Yearbook of the International Law Commission* 219
9. Assistance of the Codification Division 220

10. Websites 220
11. United Nations Audiovisual Library of International Law 220
C. Date and place of the seventieth session of the Commission 220
D. Cooperation with other bodies 220
E. Representation at the seventy-second session of the General Assembly 221
F. International Law Seminar 221

Annexes

A. General principles of law 224
B. Evidence before international courts and tribunals 242

Chapter I
Introduction

1. The International Law Commission held the first part of its sixty-ninth session from 1 May to 2 June 2017 and the second part from 3 July to 4 August 2017 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Gilberto Vergne Saboia, Second Vice-Chairperson of the sixty-eighth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Carlos J. Argüello Gómez (Nicaragua)

Mr. Bogdan Aurescu (Romania)

Mr. Yacouba Cissé (Côte d'Ivoire)

Ms. Concepción Escobar Hernández (Spain)

Ms. Patricia Galvão Teles (Portugal)

Mr. Juan Manuel Gómez Robledo (Mexico)

Mr. Claudio Grossman Guiloff (Chile)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Mr. Charles Chernor Jalloh (Sierra Leone)

Mr. Roman A. Kolodkin (Russian Federation)

Mr. Ahmed Laraba (Algeria)

Ms. Marja Lehto (Finland)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Hong Thao Nguyen (Viet Nam)

Mr. Georg Nolte (Germany)

Ms. Nilüfer Oral (Turkey)

Mr. Hassan Ouazzani Chahdi (Morocco)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

Mr. Aniruddha Rajput (India)

Mr. August Reinisch (Austria)

Mr. Juan José Ruda Santolaria (Peru)

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Sir Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Officers and the Enlarged Bureau

3. At its 3348th meeting, on 1 May 2017, the Commission elected the following officers:

Chairperson:	Mr. Georg Nolte (Germany)
First Vice-Chairperson:	Mr. Eduardo Valencia-Ospina (Colombia)
Second Vice-Chairperson:	Mr. Hussein A. Hassouna (Egypt)
Chairperson of the Drafting Committee:	Mr. Aniruddha Rajput (India)
Rapporteur:	Mr. Bogdan Aurescu (Romania)

4. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairperson of the Commission[1] and the Special Rapporteurs.[2]

5. At its 3350th meeting on 3 May 2017, the Commission set up a Planning Group composed of the following members: Mr. Eduardo Valencia-Ospina (Chairperson), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

C. Drafting Committee

6. At its 3349th, 3354th, 3360th, 3365th, 3374th and 3381st meetings, on 2, 9, 18 and 30 May and on 13 and 25 July 2017, respectively, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

(a) *Provisional application of treaties*: Mr. Aniruddha Rajput (Chairperson), Mr. Juan Manuel Gómez Robledo (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Ms. Patricia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. Pavel Šturma, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

(b) *Crimes against humanity*: Mr. Aniruddha Rajput (Chairperson), Mr. Sean D. Murphy (Special Rapporteur), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Georg Nolte, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

---

[1] Mr. Ernest Petrič.

[2] Ms. Concepción Escobar Hernández, Mr. Juan Manuel Gómez Robledo, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Pavel Šturma, Mr. Dire D. Tladi and Sir Michael Wood.

(c) *Protection of the atmosphere*: Mr. Aniruddha Rajput (Chairperson), Mr. Shinya Murase (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

(d) *Immunity of State officials from foreign criminal jurisdiction*: Mr. Aniruddha Rajput (Chairperson), Ms. Concepción Escobar Hernández (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Patricia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

(e) *Peremptory norms of general international law (jus cogens)*: Mr. Aniruddha Rajput (Chairperson), Mr. Dire D. Tladi (Special Rapporteur), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Mr. Pavel Šturma, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

(f) *Succession of States in respect of State responsibility*: Mr. Aniruddha Rajput (Chairperson), Mr. Pavel Šturma (Special Rapporteur), Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Ki Gab Park, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

7. The Drafting Committee held a total of 30 meetings on the six topics indicated above.

D. Working Groups

8. At its 3357th meeting on 12 May 2017, the Commission established a *Working Group on provisional application of treaties*: Mr. Marcelo Vázquez-Bermúdez (Chairperson), Mr. Juan Manuel Gómez Robledo (Special Rapporteur), Mr. Carlos J. Argüello Gómez, Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Pavel Šturma, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

9. At its 3380th meeting on 25 July 2017, the Commission established a *Working Group on protection of the environment in relation to armed conflicts*: Mr. Marcelo Vázquez-Bermúdez (Chairperson), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patricia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Gilberto Vergne Saboia, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

10. The Planning Group established the following Working Groups:

(a) *Working Group on the long-term programme of work*: Mr. Mahmoud D. Hmoud (Chairperson), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patrícia Galvão Teles, Mr. Juan Manuel Gómez Robledo, Mr. Claudio Grossman Guiloff, Mr. Hussein A. Hassouna, Mr. Huikang Huang, Mr. Charles Chernor Jalloh, Mr. Roman A. Kolodkin, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

(b) *Working Group on methods of work*: Mr. Hussein A. Hassouna (Chairperson), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, Sir Michael Wood and Mr. Bogdan Aurescu (*ex officio*).

E. Secretariat

11. Mr. Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, represented the Secretary-General. Mr. Huw Llewellyn, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General. Mr. Arnold Pronto, Principal Legal Officer, served as Principal Assistant Secretary to the Commission. Mr. Trevor Chimimba, Senior Legal Officer, served as Senior Assistant Secretary to the Commission. Ms. Patricia Georget, Mr. David Nanopoulos and Ms. Carla Hoe, Legal Officers, and Mr. Daniel Stewart and Mr. Bart Smit Duijzentkunst, Associate Legal Officers, served as Assistant Secretaries to the Commission.

F. Agenda

12. At its 3348th meeting, on 1 May 2017, the Commission adopted an agenda for its sixty-ninth session consisting of the following items:

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Provisional application of treaties.
4. Protection of the environment in relation to armed conflicts.
5. Protection of the atmosphere.
6. Crimes against humanity.
7. Peremptory norms of general international law (*jus cogens*).
8. Programme, procedures and working methods of the Commission and its documentation.
9. Date and place of the seventieth session.
10. Cooperation with other bodies.
11. Other business.

Chapter II
Summary of the work of the Commission at its sixty-ninth session

13. With respect to the topic "**Crimes against humanity**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/704), which addressed, in particular, the following issues: extradition, *non-refoulement*, mutual legal assistance, victims, witnesses and other affected persons, relationship to competent international criminal tribunals, federal State obligations, monitoring mechanisms and dispute settlement, remaining issues, the preamble to the draft articles, and final clauses of a convention.

14. As a result of its consideration of the topic at the present session, the Commission adopted, on first reading, a draft preamble, 15 draft articles and a draft annex, together with commentaries thereto, on crimes against humanity. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles, through the Secretary-General, to Governments, international organizations and others, for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018 (chap. IV).

15. With regard to the topic "**Provisional application of treaties**", the Commission referred draft guidelines 1 to 4 and 6 to 9, provisionally adopted by the Drafting Committee in 2016, back to the Drafting Committee, with a view to having a consolidated set of draft guidelines, as provisionally worked out thus far, prepared. The Commission subsequently provisionally adopted draft guidelines 1 to 11, as presented by the Drafting Committee at the current session, with commentaries thereto (chap. V).

16. Concerning the topic "**Protection of the atmosphere**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/705 and Corr.1), which, building upon the previous three reports, proposed four guidelines on the interrelationship between the rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including the rules of international trade and investment law, the law of the sea, and international human rights law.

17. Following the debate in the Commission, which was preceded by an informal dialogue with atmospheric scientists organized by the Special Rapporteur, the Commission decided to refer the four draft guidelines, as contained in the Special Rapporteur's fourth report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guideline 9 and three preambular paragraphs, together with commentaries thereto (chap. VI).

18. Concerning the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission continued its consideration of the fifth report of the Special Rapporteur (A/CN.4/701), which had commenced during the sixty-eighth session. The report analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction and proposed a single draft article on the issue.

19. Following the plenary debate, the Commission referred draft article 7, as proposed by the Special Rapporteur in her fifth report, to the Drafting Committee. Upon its consideration of the report of the Drafting Committee, the Commission voted to adopt draft article 7, an annex to the draft articles and a footnote to two of its headings, together with commentaries thereto (chap. VII).

20. With regard to the topic "**Peremptory norms of general international law (*jus cogens*)**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/706), which sought to set out the criteria for the identification of peremptory norms (*jus cogens*), taking the 1969 Vienna Convention on the Law of Treaties as a point of departure. The Commission subsequently decided to refer draft conclusions 4 to 9, as contained in the report of the Special Rapporteur, to the Drafting Committee, and decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)", as proposed by the Special Rapporteur. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee

on draft conclusions 2 and 4 to 7 provisionally adopted by the Committee, which was submitted to the Commission for information (chap. VIII).

21. With regard to the topic "**Succession of States in respect of State responsibility**", the Commission decided to include the topic in its programme of work, and to appoint Mr. Pavel Šturma as Special Rapporteur. The Commission had before it the first report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur's approach to the scope and outcome of the topic, and to provide an overview of general provisions relating to the topic. Following the debate in plenary, the Commission decided to refer draft articles 1 to 4, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft articles 1 and 2 provisionally adopted by the Committee, which was submitted to the Commission for information (chap. IX).

22. With respect to the topic "**Protection of the environment in relation to armed conflicts**", the Commission established a Working Group on the topic, chaired by Mr. Marcelo Vázquez-Bermúdez. The Working Group had before it the draft commentaries prepared by the former Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session of the Commission, and taken note of by the Commission at the same session. The Working Group focused its discussion on the way forward. Upon consideration of the oral report of the Chairperson of the Working Group, the Commission decided to appoint Ms. Marja Lehto as Special Rapporteur (chap. X).

23. As regards "**Other decisions and conclusions of the Commission**", the Commission decided to include the topic "**Succession of States in respect of State responsibility**" in its programme of work and decided to appoint Mr. Pavel Šturma as Special Rapporteur for the topic (chap. XI, sect. A).

24. The Commission also established a Planning Group to consider its programme, procedures and working methods, which in turn decided to establish the Working Group on the long-term programme of work, under the chairmanship of Mr. Mahmoud D. Hmoud, and the Working Group on methods of work, under the chairmanship of Mr. Hussein A. Hassouna (chap. XI, sect. B). The Commission decided to include in its long-term programme of work the topics "**General principles of law**" and "**Evidence before international courts and tribunals**" (chap. XI., sect. B.1 and annexes A and B).

25. The Commission will hold a seventieth anniversary commemorative event during its seventieth session in 2018. The commemorative event under the theme "70 years of the International Law Commission — Drawing a balance for the future", will be held in two parts, the first, to be held in New York on 21 May 2018, during the first part of its seventieth session and the second, to be held in Geneva on 5 and 6 July 2018, during the second part of its seventieth session (chap. XI, sect. B).

26. The Commission continued its traditional exchanges of information with the President of the International Court of Justice, the Committee of Legal Advisers on Public International Law of the Council of Europe, the African Union Commission on International Law, the Asian-African Legal Consultative Organization and the Inter-American Juridical Committee. Members of the Commission also held an informal exchange of views with the International Committee of the Red Cross (chap. XI, sect. D).

27. The Commission decided that its seventieth session would be held in New York from 30 April to 1 June 2018 and in Geneva from 2 July to 10 August 2018 (chap. XI, sect. C).

Chapter III
Specific issues on which comments would be of particular interest to the Commission

28. The Commission considers as still relevant the requests for information contained in Chapter III of the report of its sixty-sixth session (2014) on the topic "Protection of the atmosphere",[3] as well as in Chapter III of the report of its sixty-seventh session (2015) on the topics "Provisional application of treaties",[4] and "*Jus cogens*",[5] and would welcome any additional information.

29. The Commission would welcome any information on the issues mentioned in the paragraph above as well as the following issues, by 15 January 2018, in order for it to be taken into account in the respective reports of the Special Rapporteurs.

A. Immunity of State officials from foreign criminal jurisdiction

30. The Commission would appreciate being provided by States with information on their national legislation and practice, including judicial and executive practice, with reference to the following issues:

(a) the invocation of immunity;

(b) waivers of immunity;

(c) the stage at which the national authorities take immunity into consideration (investigation, indictment, prosecution);

(d) the instruments available to the executive for referring information, legal documents and opinions to the national courts in relation to a case in which immunity is or may be considered;

(e) the mechanisms for international legal assistance, cooperation and consultation that State authorities may resort to in relation to a case in which immunity is or may be considered.

B. Succession of States in respect of State responsibility

31. It would assist the Commission if States could provide it with any relevant international agreements, national legislation or decisions of national courts related to succession in, or distribution of, rights and obligations arising from internationally wrongful acts of, or against, a predecessor State.

C. New topics

32. The Commission decided to include in its long-term programme of work two new topics, namely (a) general principles of law; and (b) evidence before international courts and tribunals. In the selection of those topics, the Commission was guided by the following criteria that it had agreed upon at its fiftieth session (1998), namely that the topic: (a) should reflect the needs of States in respect of the progressive development and codification of international law; (b) should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; (c) should be concrete and feasible for progressive development and codification; and (d) that the Commission should not restrict itself to traditional topics, but could also consider those that reflect new developments in

---

[3] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 27.

[4] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 30.

[5] *Ibid.*, para. 31.

international law and pressing concerns of the international community as a whole. The Commission would welcome the views of States on those new topics.

33. In addition, the Commission would welcome any proposals that States may wish to make concerning possible topics for inclusion in its long-term programme of work. It would be helpful if such proposals were accompanied by a statement of reasons in their support, taking into account the criteria, referred to above, for the selection of topics.

34. The Commission notes that the commemoration of its seventieth anniversary to be held during its seventieth session in New York and Geneva would provide an opportunity for an exchange of views between States and members of the Commission on possible topics that could be considered by the Commission in the future.

Chapter IV
Crimes against humanity

A. Introduction

35. At its sixty-sixth session (2014), the Commission decided to include the topic "Crimes against humanity" in its programme of work and appointed Mr. Sean D. Murphy as Special Rapporteur.[6] The General Assembly, in paragraph 7 of its resolution 69/118 of 10 December 2014, subsequently took note of the decision of the Commission to include the topic in its programme of work.

36. At its sixty-seventh session (2015), the Commission considered the first report of the Special Rapporteur[7] and provisionally adopted four draft articles and commentaries thereto.[8] It also requested the Secretariat to prepare a memorandum providing information on existing treaty-based monitoring mechanisms that may be of relevance to its future work on the topic.[9]

37. At its sixty-eighth session (2016), the Commission considered the second report of the Special Rapporteur,[10] as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission,[11] and adopted six additional draft articles and commentaries thereto.[12]

B. Consideration of the topic at the present session

38. At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/704), which was considered at its 3348th to 3354th meetings, from 1 to 9 May 2017.[13]

39. In his third report, the Special Rapporteur addressed extradition (chap. I); *non-refoulement* (chap. II); mutual legal assistance (chap. III); victims, witnesses and other affected persons (chap. IV); relationship to competent international criminal tribunals (chap. V); federal State obligations (chap. VI); monitoring mechanisms and dispute settlement (chap. VII); remaining issues (chap. VIII); preamble (chap. IX); final clauses of a convention (chap. X); and the future programme of work on the topic (chap. XI). The Special Rapporteur proposed seven draft articles and a draft preamble corresponding to the issues addressed in chapters I to VII and IX, respectively.[14]

40. At its 3354th meeting, on 9 May 2017, the Commission referred draft articles 11 to 17 as well as the draft preamble, as contained in the Special Rapporteur's third report, to the Drafting Committee.

---

[6] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 266.

[7] A/CN.4/680 and Corr.1.

[8] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), paras. 110-117.

[9] *Ibid.*, para. 115.

[10] A/CN.4/690.

[11] A/CN.4/698.

[12] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 79-85.

[13] See the provisional summary records of the 3348th to 3354th meetings (A/CN.4/SR.3348-3354).

[14] See the third report on crimes against humanity (A/CN.4/704): draft article 11 (Extradition); draft article 12 (*Non-refoulement*); draft article 13 (Mutual legal assistance); draft article 14 (Victims, Witnesses and others); draft article 15 (Relationship to competent international criminal tribunals); draft article 16 (Federal State obligations); draft article 17 (Inter-State dispute settlement); and draft preamble.

41. At its 3366th and 3377th meetings on 1 June and 19 July 2017, respectively, the Commission considered and adopted the two reports of the Drafting Committee on the draft preamble, draft articles 1 to 15, and the draft annex. It accordingly adopted the entire set of draft articles on crimes against humanity on first reading (see section C.1 below).

42. At its 3383rd and 3384th meetings, on 31 July 2017, the Commission adopted the commentaries to the draft articles on crimes against humanity (see section C.2 below).

43. At its 3384th meeting, on 31 July 2017, the Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft articles on crimes against humanity, through the Secretary-General, to Governments, international organizations and others for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 December 2018.

44. At its 3384th meeting, on 31 July 2017, the Commission expressed its deep appreciation for the outstanding contribution of the Special Rapporteur, Mr. Sean D. Murphy, which had enabled the Commission to bring to a successful conclusion its first reading of the draft articles on crimes against humanity.

C. Text of the draft articles on crimes against humanity adopted by the Commission on first reading

1. Text of the draft articles

45. The text of the draft articles adopted by the Commission on first reading is reproduced below.

Crimes against humanity

Preamble

…

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

…

Article 1 [1][15]
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Article 2 [2]
General obligation

Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Article 3 [3]
Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

(b) "extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

---

[15] The numbers of the draft articles, as previously provisionally adopted by the Commission, are indicated in square brackets.

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Article 4 [4]
Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Article 5
Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Article 6 [5]
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Article 7 [6]
Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Article 8 [7]
Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

Article 9 [8]
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

Article 10 [9]
Aut dedere aut judicare

The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Article 11 [10]
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Article 12
Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Article 13
Extradition

1. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives.

Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

9. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Article 14
Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;

(b) taking evidence or statements from persons, including by video conference;

(c) effecting service of judicial documents;

(d) executing searches and seizures;

(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;

(g) providing originals or certified copies of relevant documents and records;

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State; or

(j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

Article 15
Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on

progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft annex;

(b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

9. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her

personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

(a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

2. Text of the draft articles and commentaries thereto

46. The text of the draft articles and commentaries thereto adopted by the Commission on first reading at its sixty-ninth session is reproduced below.

Crimes against humanity

General commentary

(1) Three crimes typically have featured in the jurisdiction of international criminal tribunals: genocide, crimes against humanity and war crimes. The crime of genocide[16] and war crimes[17] are the subject of global conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward those ends. By contrast, there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard, even though crimes against humanity are likely no less prevalent than genocide or war crimes. Unlike war crimes, crimes against humanity may occur in situations not involving armed conflict. Further, crimes against humanity do not require the special intent that is necessary for establishing genocide.[18] On the other hand, the view was expressed that neither the Genocide Convention nor the Geneva Conventions and related Protocols established detailed inter-State mechanisms for cooperation as provided for in the present draft articles. For that reason, it was considered that other core crimes could also have been addressed in the present draft articles.

(2) Treaties focused on prevention, punishment and inter-State cooperation exist for many offences far less egregious than crimes against humanity, such as corruption[19] and organized crime.[20] Consequently, a global convention on prevention and punishment of crimes against humanity might serve as an important additional piece in the current framework of international law, and in particular, international humanitarian law, international criminal law and international human rights law. Such a convention could draw further attention to the need for prevention and punishment and could help States to adopt and harmonize national laws relating to such conduct, thereby opening the door to more effective inter-State cooperation on the prevention, investigation and prosecution of such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, thereby — it is hoped — helping both to deter such conduct *ab initio* and to ensure accountability *ex post*.

---

[16] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277 (hereinafter "Genocide Convention").

[17] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), United Nations, *Treaty Series*, vol. 75, No. 970, p. 31 (hereinafter "Geneva Convention I"); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949), *ibid.*, No. 971, p. 85 (hereinafter "Geneva Convention II"); Geneva Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949), *ibid.*, No. 972, p. 135 (hereinafter "Geneva Convention III"); Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949), *ibid.*, No. 973, p. 287 (hereinafter "Geneva Convention IV"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Geneva, 8 June 1977), United Nations, *Treaty Series*, vol. 1125, No. 17512, p. 3 (hereinafter "Protocol I").

[18] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, para. 139 ("The Court recalls that, in 2007, it held that the intent to destroy a national, ethnic, racial or religious group as such is specific to genocide and distinguishes it from other related criminal acts such as crimes against humanity and persecution".) (citing to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at pp. 121-122, paras. 187-188).

[19] United Nations Convention against Corruption (New York, 31 October 2003), United Nations, *Treaty Series*, vol. 2349, No. 42146, p. 41.

[20] United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209.

(3) Hence, the proposal for this topic, as adopted by the Commission at its sixty-fifth session in 2013, states that the "objective of the International Law Commission on this topic … would be to draft articles for what would become a Convention on the Prevention and Punishment of Crimes against Humanity".[21] In accordance with the Commission's practice, and in advance of a decision by States as to whether to use these draft articles as the basis for a convention, the Commission has not included technical language characteristic of treaties (for example, referring to "States Parties") and has not drafted final clauses on matters such as ratification, reservations, entry into force or amendment.

(4) The present draft articles avoid any conflicts with the obligations of States arising under the constituent instruments of international or "hybrid" (containing a mixture of international law and national law elements) criminal courts or tribunals, including the International Criminal Court. Whereas the 1998 Rome Statute establishing the International Criminal Court regulates relations between the International Criminal Court and its States parties (a "vertical" relationship), the focus of the present draft articles is on the adoption of national laws and on inter-State cooperation (a "horizontal" relationship). Part IX of the 1998 Rome Statute on "International Cooperation and Judicial Assistance" assumes that inter-State cooperation on crimes within the jurisdiction of the International Criminal Court will continue to exist without prejudice to the 1998 Rome Statute, but does not direct itself to the regulation of that cooperation. The present draft articles address inter-State cooperation on the prevention of crimes against humanity, as well as on the investigation, apprehension, prosecution, extradition and punishment in national legal systems of persons who commit such crimes, an objective consistent with the 1998 Rome Statute. In doing so, the present draft articles contribute to the implementation of the principle of complementarity under the 1998 Rome Statute. Finally, constituent instruments of international or hybrid criminal courts or tribunals address the prosecution of persons for the crimes within their jurisdiction, not steps that should be taken by States to prevent such crimes before they are committed or while they are being committed.

Preamble

…

Mindful that throughout history millions of children, women and men have been victims of crimes that deeply shock the conscience of humanity,

Recognizing that crimes against humanity threaten the peace, security and well-being of the world,

Recognizing further that the prohibition of crimes against humanity is a peremptory norm of general international law (*jus cogens*),

Affirming that crimes against humanity, which are among the most serious crimes of concern to the international community as a whole, must be prevented in conformity with international law,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling the definition of crimes against humanity as set forth in article 7 of the Rome Statute of the International Criminal Court,

Recalling also that it is the duty of every State to exercise its criminal jurisdiction with respect to crimes against humanity,

Considering that, because crimes against humanity must not go unpunished, the effective prosecution of such crimes must be ensured by taking measures at the national level and by enhancing international cooperation, including with respect to extradition and mutual legal assistance,

---

[21] See report of the International Law Commission on the work of its sixty-fifth session (2013), *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), annex B, para. 3.

Considering as well the rights of victims, witnesses and others in relation to crimes against humanity, as well as the right of alleged offenders to fair treatment,

…

Commentary

(1) The preamble aims to provide a conceptual framework for the present draft articles on crimes against humanity, setting out the general context in which the topic was elaborated and the main purposes of the present draft articles. In part, it draws inspiration from language used in the preambles of international treaties relating to the most serious crimes of concern to the international community as a whole, including the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the 1998 Rome Statute of the International Criminal Court.[22]

(2) The first preambular paragraph recalls the fact that, over the course of history, millions of people have been victimized by acts that deeply shock the conscience of humanity. When such acts, because of their gravity, constitute egregious attacks on humankind itself, they are referred to as crimes against humanity.

(3) The second preambular recognizes that such crimes endanger important contemporary values ("peace, security and well-being of the world"). In so doing, this paragraph echoes the purposes set forth in Article 1 of the Charter of the United Nations, and stresses the link between the pursuit of criminal justice and the maintenance of peace and security.

(4) The third preambular paragraph recognizes that the prohibition of crimes against humanity is not just a rule of international law; it is a peremptory norm of general international law (*jus cogens*). As such, this prohibition is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[23] The Commission has previously indicated that the prohibition of crimes against humanity is "clearly accepted and recognized" as a peremptory norm of international law.[24] The International Court of Justice has indicated that the prohibition on certain acts, such as torture,[25] has the character of *jus cogens*,[26] which *a fortiori* suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of *jus cogens*.[27]

---

[22] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3 (hereinafter "Rome Statute").

[23] Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331, art. 53.

[24] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 85, para. (5) of the commentary on art. 26 of the draft articles on responsibility of States for internationally wrongful acts (maintaining that those "peremptory norms that are clearly accepted and recognized include the [prohibition] of … crimes against humanity"); see also Fragmentation of international law: difficulties arising from the diversification and expansion of international law, report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), para. 374 (identifying crimes against humanity as one of the "most frequently cited candidates for the status of *jus cogens*").

[25] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), United Nations, *Treaty Series*, vol. 1465, No. 24841, p. 85 (hereinafter "Convention against Torture").

[26] *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v. Senegal*), *Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

[27] See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99, at p. 141, para. 95 (indicating that rules prohibiting war crimes and crimes against humanity at issue in the *Arrest Warrant* case "undoubtedly possess the character of *jus cogens*"); *Almonacid-Arellano et al. v. Chile*, Judgment of 26 September 2006 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 154, para. 96 (acknowledging the *jus cogens* status of crimes against humanity); *Prosecutor v.*

(5) As indicated in draft article 1 below, the present draft articles have two overall objectives: the prevention and the punishment of crimes against humanity. The fourth preambular paragraph focuses upon the first of these two objectives (prevention); it foreshadows obligations that appear in draft articles 2, 4 and 5 of the present draft articles by affirming that crimes against humanity must be prevented in conformity with international law. In doing so, this paragraph indicates that such crimes are among the most serious crimes of concern to the international community as a whole.

(6) The fifth preambular paragraph affirms the link between the first overall objective (prevention) and the second overall objective (punishment) of the present draft articles, by indicating that prevention is advanced by putting an end to impunity for the perpetrators of such crimes.

(7) The sixth through ninth preambular paragraphs focus upon the second of the two overall objectives (punishment). The sixth preambular paragraph recalls, as a threshold matter, the definition of crimes against humanity set forth in article 7 of the 1998 Rome Statute of the International Criminal Court. This definition is used in draft article 3 of the present draft articles and, in conjunction with draft articles 6 and 7, identifies the offences over which States must establish jurisdiction under their national criminal law.

(8) The seventh preambular paragraph recalls the duty of every State to exercise criminal jurisdiction with respect to crimes against humanity. Among other things, this paragraph foreshadows draft articles 8 through 10 on the investigation of crimes against humanity, the taking of certain measures whenever an alleged offender is present, and the submission of the case to the prosecuting authorities unless the alleged offender is extradited or surrendered to another State or competent international tribunal.

(9) The eighth preambular paragraph considers that the effective prosecution of crimes against humanity must be ensured, both by taking measures at the national level and by enhancing international cooperation. Such cooperation includes cooperation with respect to extradition and mutual legal assistance, the focus of draft articles 13 and 14, as well as the draft annex.

(10) The ninth preambular paragraph notes that attention must be paid to the rights of individuals when addressing crimes against humanity. Reference to the rights of victims, witnesses and others anticipates the provisions set forth in draft article 12, including the right to complain to competent authorities, to participate in criminal proceedings, and to obtain reparation. At the same time, the reference to the right of alleged offenders to fair treatment anticipates the provisions set forth in draft article 11, including the right to a fair trial and, when appropriate, access to consular authorities.

Article 1
Scope

The present draft articles apply to the prevention and punishment of crimes against humanity.

Commentary

(1) Draft article 1 establishes the scope of the present draft articles by indicating that they apply both to the prevention and to the punishment of crimes against humanity. Prevention of crimes against humanity is focused on precluding the commission of such offences, while punishment of crimes against humanity is focused on criminal proceedings against persons after such crimes have occurred or when they are in the process of being committed.

(2) The present draft articles focus solely on crimes against humanity, which are grave international crimes wherever they occur. The present draft articles do not address other

---

Furundžija, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 153 (same); *Al-Adsani v. United Kingdom*, Application No. 35763/97, Judgment of 21 November 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-XI (same), para. 61.

grave international crimes, such as genocide, war crimes or the crime of aggression. Although a view was expressed that this topic might include those crimes as well, the Commission decided to focus on crimes against humanity.

Article 2
General obligation

> Crimes against humanity, whether or not committed in time of armed conflict, are crimes under international law, which States undertake to prevent and punish.

Commentary

(1) Draft article 2 sets forth a general obligation of States to prevent and punish crimes against humanity. The content of this general obligation is addressed through the various more specific obligations set forth in the draft articles that follow, beginning with draft article 4. Those specific obligations address steps that States are to take within their national legal systems, as well as their cooperation with other States, with relevant intergovernmental organizations and with, as appropriate, other organizations.

(2) In the course of stating this general obligation, draft article 2 recognizes crimes against humanity as "crimes under international law". The Charter of the International Military Tribunal established at Nürnberg[28] (hereinafter "Nürnberg Charter") included "crimes against humanity" as a component of the jurisdiction of the Tribunal. Among other things, the Tribunal noted that "individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[29] Crimes against humanity were also within the jurisdiction of the International Military Tribunal for the Far East (hereinafter "Tokyo Tribunal").[30]

(3) The principles of international law recognized in the Nürnberg Charter were noted and reaffirmed in 1946 by the General Assembly.[31] The Assembly also directed the Commission to "formulate" the Nürnberg Charter principles and to prepare a draft code of offences.[32] The Commission in 1950 produced the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, which stated that crimes against humanity were "punishable as crimes under international law".[33] Further, the Commission completed in 1954 a draft Code of Offences against the Peace and Security of Mankind, which, in article 2, paragraph 11, included as an offence a series of inhuman acts that are today understood to be crimes against humanity, and which stated in article 1 that "[o]ffences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished".[34]

---

[28] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, art. 6 (c) (London, 8 August 1945), United Nations, *Treaty Series*, vol. 82, p. 279 (hereinafter "Nürnberg Charter").

[29] *Judgment of 30 September 1946, International Military Tribunal, in Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945-1 October 1946)*, vol. 22 (1948), p. 466.

[30] Charter of the International Military Tribunal for the Far East, art. 5 (c) (Tokyo, 19 January 1946) (as amended on 26 April 1946), *Treaties and Other International Agreements of the United States of America 1776-1949*, vol. 4, C. Bevans, ed. (Washington, D.C., Department of State, 1968), p. 20, at p. 23, art. 5 (c) (hereinafter "Tokyo Charter"). No persons, however, were convicted of this crime by that tribunal.

[31] *Affirmation of the principles of international law recognized by the Charter of the Nürnberg Tribunal*, General Assembly resolution 95 (I) of 11 December 1946.

[32] *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and the judgment of the Tribunal*, General Assembly resolution 177 (II) of 21 November 1947.

[33] *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 376 (principle VI).

[34] *Yearbook ... 1954*, vol. II, p. 150.

(4) The characterization of crimes against humanity as "crimes under international law" indicates that they exist as crimes whether or not the conduct has been criminalized under national law. The Nürnberg Charter defined crimes against humanity as the commission of certain acts "whether or not in violation of the domestic law of the country where perpetrated" (art. 6 (c)). In 1996, the Commission completed a draft Code of Crimes against the Peace and Security of Mankind, which provided, *inter alia*, that crimes against humanity were "crimes under international law and punishable as such, whether or not they are punishable under national law".[35] The gravity of such crimes is clear; the Commission has previously indicated that the prohibition of crimes against humanity is "clearly accepted and recognized" as a peremptory norm of international law.

(5) Draft article 2 also identifies crimes against humanity as crimes under international law "whether or not committed in time of armed conflict". The reference to "armed conflict" should be read as including both international and non-international armed conflict. The Nürnberg Charter definition of crimes against humanity, as amended by the Berlin Protocol,[36] was linked to the existence of an international armed conflict; the acts only constituted crimes under international law if committed "in execution of or in connection with" any crime within the jurisdiction of the International Military Tribunal, meaning a crime against peace or a war crime. As such, the justification for dealing with matters that traditionally were within the national jurisdiction of a State was based on the crime's connection to inter-State conflict. That connection, in turn, suggested heinous crimes occurring on a large-scale, perhaps as part of a pattern of conduct.[37] The International Military Tribunal, charged with trying the senior political and military leaders of the Third Reich, convicted several defendants for crimes against humanity committed during the war, although in some instances the connection of those crimes with other crimes within the jurisdiction of the International Military Tribunal was tenuous.[38]

(6) The Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal also defined crimes against humanity in Principle VI (c) in a manner that required a connection to an armed conflict.[39] In its commentary to this principle, the Commission emphasized that the crime need not be committed during a war, but maintained that pre-war crimes must nevertheless be in connection with a crime against peace.[40] At the same time, the Commission maintained that "acts may be crimes against humanity even if they are committed by the perpetrator against his own population".[41] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity referred, in article I (b), to "[c]rimes against humanity whether committed in time of war or in time of peace as they

---

[35] *Yearbook ... 1996*, vol. II (Part Two), p. 17, para. 50 (art. 1). The 1996 draft Code contained five categories of crimes, one of which was crimes against humanity.

[36] Protocol Rectifying Discrepancy in Text of Charter (Berlin, 6 October 1945), in *Trial of the Major War Criminals Before the International Military Tribunal (Nuremberg 14 November 1945-1 October 1946)*, vol. 1 (1947), pp. 17-18 (hereinafter "Berlin Protocol"). The Berlin Protocol replaced a semi-colon after "during the war" with a comma, so as to harmonize the English and French texts with the Russian text. *Ibid.*, p. 17. The effect of doing so was to link the first part of the provision to the latter part of the provision ("in connection with any crime within the jurisdiction of the Tribunal") and hence to the existence of an international armed conflict.

[37] See United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (His Majesty's Stationery Office, 1948), p. 179 ("Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims").

[38] See, for example, *Prosecutor v. Kupreškić et al.*, Case No. IT-95-16-T, Judgment, 14 January 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 576 (noting the tenuous link between the crimes against humanity committed by Baldur von Schirach and the other crimes within the jurisdiction of the International Military Tribunal), *Judicial Supplement No. 11*, January 2000.

[39] *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377.

[40] *Ibid.*, para. 123.

[41] *Ibid.*, para. 124.

are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (I) of 11 December 1946 of the General Assembly of the United Nations".[42]

(7) The jurisdiction of the International Criminal Tribunal for the Former Yugoslavia included "crimes against humanity". Article 5 of the Statute of the International Criminal Tribunal for the Former Yugoslavia provides that the Tribunal may prosecute persons responsible for a series of acts (such as murder, torture or rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population".[43] Thus, the formulation used in article 5 retained a connection to armed conflict, but it is best understood contextually. The Statute of the International Criminal Tribunal for the Former Yugoslavia was developed in 1993 with an understanding that armed conflict in fact existed in the former Yugoslavia; the Security Council had already determined that the situation constituted a threat to international peace and security, leading to the exercise of the Security Council's enforcement powers under Chapter VII of the Charter of the United Nations. As such, the formulation used in article 5 ("armed conflict") was designed principally to dispel the notion that crimes against humanity had to be linked to an "international armed conflict". To the extent that this formulation might be read to suggest that customary international law requires a nexus to armed conflict, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia later clarified that there was "no logical or legal basis" for retaining a connection to armed conflict, since "it has been abandoned" in State practice since Nürnberg.[44] The Appeals Chamber also noted that the "obsolescence of the nexus requirement is evidenced by international conventions regarding genocide and apartheid, both of which prohibit particular types of crimes against humanity regardless of any connection to armed conflict".[45] Indeed, the Appeals Chamber later maintained that such a connection in the Statute of the International Criminal Tribunal for the Former Yugoslavia was simply circumscribing the subject-matter jurisdiction of the International Criminal Tribunal for the Former Yugoslavia, not codifying customary international law.[46]

(8) In 1994, the Security Council established the International Criminal Tribunal for Rwanda and provided it with jurisdiction over "crimes against humanity". Although article 3 of the Statute of the International Criminal Tribunal for Rwanda retained the same series of acts as appeared in the Statute of the International Criminal Tribunal for the Former

---

[42] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (New York, 26 November 1968), United Nations, *Treaty Series*, vol. 754, No. 10823, p. 73. As of July 2017, there were 55 States parties to this Convention. For a regional convention of a similar nature, see the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (Strasbourg, 25 January 1974), Council of Europe, *Treaty Series*, No. 82. As of July 2017, there were eight States parties to this Convention.

[43] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, approved by the Security Council in its resolution 827 (1993) of 25 May 1993 and contained in the report of the Secretary-General pursuant to para. 2 of Security Council resolution 808 (1993), S/25704 and Add.1, annex, art. 5 (hereinafter "Statute of the International Criminal Tribunal for the Former Yugoslavia").

[44] *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-AR72, Decision on the defence motion for interlocutory appeal on jurisdiction, 2 October 1995, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1994-1995*, vol. I, para. 140. See also *International Legal Materials* (ILM), vol. 35, No. 1 (January 1996), para. 140.

[45] *Ibid.*

[46] See, for example, *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-T, Judgment, 26 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 33, *Judicial Supplement No. 24*, April/May 2001; *Prosecutor v. Duško Tadić*, Case No. IT-94-1-A, Judgment, 15 July 1999, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 249-251, *Judicial Supplement No. 6*, June/July 1999. See also ILM, vol. 38 (1999) ("[T]he armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law").

Yugoslavia, the chapeau language did not retain the reference to armed conflict.[47] Likewise, article 7 of the 1998 Rome Statute did not retain any reference to armed conflict.

(9) As such, while early definitions of crimes against humanity required that the underlying acts be accomplished in connection with armed conflict, that connection has disappeared from the statutes of contemporary international criminal tribunals, including the 1998 Rome Statute. In its place, as discussed in relation to draft article 3 below, are the "chapeau" requirements that the crime be committed as part of a widespread or systematic attack directed against any civilian population pursuant to or in furtherance of a State or organizational policy to commit such attack.

Article 3
Definition of crimes against humanity

1. For the purpose of the present draft articles, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) murder;

(b) extermination;

(c) enslavement;

(d) deportation or forcible transfer of population;

(e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) torture;

(g) rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes;

(i) enforced disappearance of persons;

(j) the crime of apartheid;

(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) "attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;

---

[47] Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committee in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994, Security Council resolution 955 (1994) of 8 November 1994, annex, art. 3 (hereinafter "Statute of the International Criminal Tribunal for Rwanda"); see *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgment, 20 May 2005, Appeals Chamber, International Criminal Tribunal for Rwanda, para. 269 ("[C]ontrary to Article 5 of the [Statute of the International Criminal Tribunal for the Former Yugoslavia], Article 3 of the [Statute of the International Criminal Tribunal for Rwanda] does not require that the crimes be committed in the context of an armed conflict. This is an important distinction").

(b) "extermination" includes the intentional infliction of conditions of life including, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

(c) "enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;

(d) "deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;

(e) "torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused, except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

(f) "forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;

(g) "persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

(h) "the crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) "enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of the present draft articles, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

4. This draft article is without prejudice to any broader definition provided for in any international instrument or national law.

Commentary

(1) The first three paragraphs of draft article 3 establish, for the purpose of the present draft articles, a definition of "crime against humanity". The text of these three paragraphs is verbatim the text of article 7 of the 1998 Rome Statute, except for three non-substantive changes (discussed below), which are necessary given the different context in which the definition is being used. Paragraph 4 of draft article 3 is a "without prejudice" clause which indicates that this definition does not affect any broader definitions provided for in international instruments or national laws.

Definitions in other instruments

(2) Various definitions of "crimes against humanity" have been used since 1945, both in international instruments and in national laws that have codified the crime. The Nürnberg Charter, in article 6 (c), defined "crimes against humanity" as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any

> crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

(3) Principle VI (c) of the Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal defined crimes against humanity as: "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime".[48]

(4) Furthermore, the Commission's 1954 draft Code of Offences against the Peace and Security of Mankind identified as one of those offences: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial, religious or cultural grounds by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities".[49]

(5) Article 5 of the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia stated that the Tribunal "shall have the power to prosecute persons responsible" for a series of acts (such as murder, torture, and rape) "when committed in armed conflict, whether international or internal in character, and directed against any civilian population". Although the report of the Secretary-General of the United Nations proposing this article indicated that crimes against humanity "refer to inhumane acts of a very serious nature ... committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds",[50] that particular language was not included in the text of article 5.

(6) By contrast, the 1994 Statute of the International Criminal Tribunal for Rwanda, in article 3, retained the same series of acts, but the chapeau language introduced the formulation from the 1993 Secretary-General's report of "crimes when committed as part of a widespread or systematic attack against any civilian population" and then continued with "on national, political, ethnic, racial or religious grounds". As such, the Statute of the International Criminal Tribunal for Rwanda expressly provided that a discriminatory intent was required in order to establish the crime. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also defined "crimes against humanity" to be a series of specified acts "when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group", but did not include the discriminatory intent language.[51] Crimes against humanity have also been defined in the jurisdiction of hybrid criminal courts or tribunals.[52]

(7) Article 5, paragraph 1 (b), of the 1998 Rome Statute lists crimes against humanity as being within the jurisdiction of the International Criminal Court. Article 7, paragraph 1, defines "crime against humanity" as any of a series of acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7, paragraph 2, contains a series of definitions which, *inter alia*, clarify that an attack directed against any civilian population "means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" (para. 2 (a)). Article 7, paragraph 3, provides: "[I]t is understood that the term 'gender'

---

[48] *Yearbook ... 1950*, vol. II, document A/1316, Part III, p. 377, para. 119.

[49] *Yearbook ... 1954*, vol. II, p. 150, para. 50 (art. 2, para. 11).

[50] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), document S/25704 and Corr.1, p. 13, para. 48.

[51] *Yearbook ... 1996*, vol. II (Part Two), p. 47, art. 18.

[52] See, for example, Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (with Statute) (Freetown, 16 January 2002), United Nations, *Treaty Series*, vol. 2178, No. 38342, p. 137, p. 145 (hereinafter "Statute of the Special Court for Sierra Leone"); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 27 October 2004, art. 5 (hereinafter "Extraordinary Chambers of Cambodia Agreement").

refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above". Article 7, paragraph 1 (h), does not retain the nexus to an armed conflict that characterized the Statute of the International Criminal Tribunal for the Former Yugoslavia, nor (except with respect to acts of persecution) the discriminatory intent requirement that characterized the Statute of the International Criminal Tribunal for Rwanda.

(8) The definition of "crime against humanity" in article 7 of the 1998 Rome Statute has been accepted by the more than 120 States parties to the 1998 Rome Statute and is now being used by many States when adopting or amending their national laws. The Commission considered article 7 an appropriate basis for defining such crimes in paragraphs 1 to 3 of draft article 3. Indeed, the text of article 7 is used verbatim except for three non-substantive changes, which are necessary given the different context in which the definition is being used. First, the opening phrase of paragraph 1 reads "For the purpose of the present draft articles" rather than "For the purpose of this Statute". Second, the same change has been made in the opening phrase of paragraph 3. Third, article 7, paragraph 1 (h), of the 1998 Rome Statute criminalizes acts of persecution when undertaken "in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Again, to adapt to the different context, this phrase reads in draft article 3 as "in connection with any act referred to in this paragraph or in connection with the crime of genocide or war crimes". In due course, the International Criminal Court may exercise its jurisdiction over the crime of aggression when the requirements established at the Review Conference of the 1998 Rome Statute of the International Criminal Court are met, in which case this paragraph may need to be revisited.

Paragraphs 1 to 3

(9) The definition of "crimes against humanity" set forth in paragraphs 1 to 3 of draft article 3 contains three overall requirements that merit some discussion. These requirements, all of which appear in paragraph 1, have been illuminated through the case law of the International Criminal Court and other international or hybrid courts and tribunals. The definition also lists the underlying prohibited acts for crimes against humanity and defines several of the terms used within the definition (thus providing definitions within the definition). No doubt the evolving jurisprudence of the International Criminal Court and other international or hybrid tribunals will continue to help inform national authorities, including courts, as to the meaning of this definition, and thereby will promote harmonized approaches at the national level. The Commission notes that relevant case law continues to develop over time, such that the following discussion is meant simply to indicate some of the parameters of these terms as of July 2017.

"Widespread or systematic attack"

(10) The first overall requirement is that the acts must be committed as part of a "widespread or systematic" attack. This requirement first appeared in the Statute of the International Criminal Tribunal for Rwanda,[53] although some decisions of the International Criminal Tribunal for the Former Yugoslavia maintained that the requirement was implicit even in the Statute of the International Criminal Tribunal for the Former Yugoslavia, given the inclusion of such language in the Secretary-General's report proposing that Statute.[54]

---

[53] Unlike the English version, the French version of article 3 of the Statute of the International Criminal Tribunal for Rwanda used a conjunctive formulation ("généralisée et systématique"). In the *Akayesu* case, the Trial Chamber indicated: "In the original French version of the Statute, these requirements were worded cumulatively ... thereby significantly increasing the threshold for application of this provision. Since Customary International Law requires only that the attack be either widespread or systematic, there are sufficient reasons to assume that the French version suffers from an error in translation". *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 579, footnote 144.

[54] *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14-T, Judgment, 3 March 2000, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 202; *Prosecutor v. Duško Tadić a/k/a "Dule"*, Case No. IT-94-1-T, Opinion and Judgment, 7 May 1997,

Jurisprudence of both the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda maintained that the conditions of "widespread" and "systematic" were disjunctive rather than conjunctive requirements; either condition could be met to establish the existence of the crime.[55] This reading of the widespread/systematic requirement is also reflected in the Commission's commentary to the 1996 draft Code, where it stated that "an act could constitute a crime against humanity if either of these conditions [of scale or systematicity] is met".[56]

(11) When this standard was considered for the 1998 Rome Statute, some States expressed the view that the conditions of "widespread" and "systematic" should be conjunctive requirements — that they both should be present to establish the existence of the crime — because otherwise the standard would be over-inclusive.[57] Indeed, if "widespread" commission of acts alone were sufficient, these States maintained that spontaneous waves of widespread, but unrelated, crimes would constitute crimes against humanity. Owing to that concern, a compromise was developed that involved leaving these conditions in the disjunctive,[58] but adding to article 7, paragraph 2 (a), of the 1998 Rome Statute a definition of "attack directed against any civilian population" which, as discussed below at paragraphs (17) to (27) of the commentary to the present draft article, contains a policy element.

(12) According to the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, "[t]he adjective 'widespread' connotes the large-scale

---

Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1997*, para. 648.

[55] See, for example, *Prosecutor v. Mile Mrkšić, Miroslav Radić and Veselin Šljivančanin*, Case No. IT-95-13/1-T, Judgment, 27 September 2007, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, para. 437 ("[T]he attack must be widespread or systematic, the requirement being disjunctive rather than cumulative"); *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, Trial Chamber, International Criminal Tribunal for Rwanda, para. 123 ("The attack must contain one of the alternative conditions of being widespread or systematic"); *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 579; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 648 ("either a finding of widespreadness … or systematicity … fulfils this requirement").

[56] *Yearbook … 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18. See also the report of the Ad Hoc Committee on the Establishment of a Permanent International Criminal Court, *Official Records of the General Assembly, Fiftieth Session, Supplement No. 22* (A/50/22), para. 78 ("elements that should be reflected in the definition of crimes against humanity included … [that] the crimes usually involved a widespread *or* systematic attack" (emphasis added)); *Yearbook … 1995*, vol. II (Part Two), para. 90 ("the concepts of 'systematic' and 'massive' violations were complementary elements of the crimes concerned"); *Yearbook … 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 ("the definition of crimes against humanity encompasses inhumane acts of a very serious character involving widespread *or* systematic violations" (emphasis added)); *Yearbook … 1991*, vol. II (Part Two), p. 103, para. (3) of the commentary to art. 21 ("Either one of these aspects — systematic or mass-scale — in any of the acts enumerated … is enough for the offence to have taken place").

[57] See *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Records, Volume II*, document A/CONF.183/13 (Vol. II), p. 148 (India); *ibid.*, p. 150 (United Kingdom of Great Britain and Northern Ireland, France); *ibid.*, p. 151 (Thailand, Egypt); *ibid.*, p. 152 (Islamic Republic of Iran); *ibid.*, p. 154 (Turkey); *ibid.*, p. 155 (Russian Federation); *ibid.*, p. 156 (Japan).

[58] Case law of the International Criminal Court has affirmed that the conditions of "widespread" and "systematic" in article 7 of the 1998 Rome Statute are disjunctive. See *Situation in the Republic of Kenya*, Case No. ICC-01/09, Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the *Situation in the Republic of Kenya*, 31 March 2010, Pre-Trial Chamber II, International Criminal Court, para. 94; see also *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges, 15 June 2009, Pre-Trial Chamber II, International Criminal Court, para. 82; *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, Trial Chamber III, International Criminal Court, para. 162.

nature of the attack and the number of its victims".[59] As such, this requirement refers to a "multiplicity of victims"[60] and excludes isolated acts of violence,[61] such as murder directed against individual victims by persons acting of their own volition rather than as part of a broader initiative. Such an attack may be "massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims".[62] At the same time, a single act committed by an individual perpetrator can constitute a crime against humanity if it occurs within the context of a broader campaign.[63] There is no specific numerical threshold of victims that must be met for an attack to be "widespread".

(13) "Widespread" can also have a geographical dimension, with the attack occurring in different locations.[64] Thus, in the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was sufficient evidence to establish that an attack was "widespread" based on reports of attacks in various locations over a large geographical area, including evidence of thousands of rapes, mass grave sites and a large number of victims.[65] Yet a large geographic area is not required; the International Criminal Tribunal for the Former Yugoslavia has found that the attack can be in a small geographic area against a large number of civilians.[66]

---

[59] *Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 428, *Judicial Supplement No. 23*, February/March 2001; see also *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 163; *Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Judgment, 7 March 2014, Trial Chamber II, International Criminal Court, para. 1123; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Decision on the confirmation of charges, 30 September 2008, Pre-Trial Chamber I, International Criminal Court, para. 394; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, Judgment, 17 January 2005, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, paras. 545-546; *Prosecutor v. Dario Kordić and Mario Čerkez*, Case No. IT-95-14/2-A, Judgment [and corrigendum], 17 December 2004, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94.

[60] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 83; *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 580; *Yearbook … 1996*, vol. II (Part Two), p. 47, art. 18 (using the phrase "on a large scale" instead of widespread); see also *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 437 ("'widespread' refers to the large scale nature of the attack and the number of victims"). In *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the charges of the Prosecutor against Bosco Ntaganda, 9 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 24, the Chamber found that the attack against the civilian population was widespread "as it resulted in a large number of civilian victims".

[61] See *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06, Decision on the Prosecutor's application under Article 58, 13 July 2012, Pre-Trial Chamber II, International Criminal Court, para. 19; *Prosecutor v. Ahmad Harun and Ali Muhammad al abd-al-Rahman*, Case No. ICC-02/05-01/07, Decision on the prosecution application under Article 58(7) of the Statute, 27 April 2007, Pre-Trial Chamber I, International Criminal Court, para. 62; see also *Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, Judgment, 6 December 1999, Trial Chamber I, International Criminal Tribunal for Rwanda, paras. 67-69; *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), paras. 122-123; *Yearbook … 1996*, vol. II (Part Two), p. 47; *Yearbook … 1991*, vol. II (Part Two), p. 103.

[62] *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 163 (citing to *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 83).

[63] *Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), para. 550; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 649.

[64] See, for example, *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 30; *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Case No. ICC-01/09-01/11, Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 177.

[65] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), paras. 117-124; see *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), paras. 688-689.

[66] *Kordić*, Judgment, 17 December 2004 (see footnote 59 above), para. 94; *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 206.

(14) In its *Situation in the Republic of Kenya* decision, the International Criminal Court Pre-Trial Chamber indicated that "[t]he assessment is neither exclusively quantitative nor geographical, but must be carried out on the basis of the individual facts".[67] An attack may be widespread due to the cumulative effect of multiple inhumane acts or the result of a single inhumane act of great magnitude.[68]

(15) Like "widespread", the term "systematic" excludes isolated or unconnected acts of violence,[69] and jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court reflects a similar understanding of what is meant by the term. The International Criminal Tribunal for the Former Yugoslavia defined "systematic" as "the organised nature of the acts of violence and the improbability of their random occurrence"[70] and found that evidence of a pattern or methodical plan establishes that an attack was systematic.[71] Thus, the Appeals Chamber in *Kunarac* confirmed that "patterns of crimes — that is the non-accidental repetition of similar criminal conduct on a regular basis — are a common expression of such systematic occurrence".[72] The International Criminal Tribunal for Rwanda has taken a similar approach.[73]

(16) Consistent with jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and of the International Criminal Tribunal for Rwanda, an International Criminal Court Pre-Trial Chamber in *Harun* found that "systematic" refers to "the organised nature of the acts of violence and improbability of their random occurrence".[74] An International Criminal Court Pre-Trial Chamber in *Katanga* found that the term "has been understood as either an organized plan in furtherance of a common policy, which follows a regular pattern and results in a continuous commission of acts or as 'patterns of crimes' such that the crimes constitute a 'non-accidental repetition of similar criminal conduct on a regular basis'".[75] In applying the standard, an International Criminal Court Pre-Trial Chamber in *Ntaganda* found an attack to be systematic since "the perpetrators employed similar means and methods to attack the different locations: they approached the targets simultaneously, in large numbers, and from different directions, they attacked villages with heavy weapons, and systematically chased the population by similar methods, hunting house by house and into the bushes, burning all properties and looting".[76] Additionally, in the *Ntaganda* confirmation of charges decision, a Pre-Trial Chamber held that the attack was systematic as it followed a "regular pattern" with a "recurrent *modus operandi*, including the erection of roadblocks, the laying of land mines, and coordinated

---

[67] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 95; see also *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 163.

[68] *Yearbook … 1996*, vol. II (Part Two), p. 47, para. (4) of the commentary to art. 18 of the draft Code of Crimes against the Peace and Security of Mankind; see also *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 83 (finding that widespread "entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians").

[69] See *Yearbook … 1996*, vol. II (Part Two), p. 47; *Yearbook … 1991*, vol. II (Part Two), p. 103.

[70] *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 437; *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 429.

[71] See, for example, *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 648.

[72] *Prosecutor v. Kunarac*, Case No. IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 94, *Judicial Supplement No. 34*, June 2002.

[73] *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 123; *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 580.

[74] *Harun*, Decision, 27 April 2007 (see footnote 61 above), para. 62 (citing to *Kordić*, Judgment, 17 December 2004 (see footnote 59 above), para. 94, which in turn cites to *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 429); see also *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 179; *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 96; *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 394.

[75] *Katanga*, Decision, 30 September 2008 (see footnote 59), para. 397.

[76] *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 31; see also *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 179.

the commission of the unlawful acts ... in order to attack the non-Hema civilian population".[77] In *Gbagbo*, an International Criminal Court Pre-Trial Chamber found an attack to be systematic when "preparations for the attack were undertaken in advance" and the attack was planned and coordinated with acts of violence revealing a "clear pattern".[78]

"Directed against any civilian population"

(17) The second overall requirement is that the act must be committed as part of an attack "directed against any civilian population". Draft article 3, paragraph 2 (a), defines "attack directed against any civilian population" for the purpose of paragraph 1 as "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack".[79] As discussed below, jurisprudence from the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court has construed the meaning of each of these terms: "directed against", "any", "civilian", "population", "a course of conduct involving the multiple commission of acts" and "State or organizational policy".

(18) The International Criminal Tribunal for the Former Yugoslavia has found that the phrase "directed against" requires that civilians be the intended primary target of the attack, rather than incidental victims.[80] The International Criminal Court Pre-Trial Chambers subsequently adopted this interpretation in the *Bemba* case and the *Situation in the Republic of Kenya* decision,[81] as did the International Criminal Court Trial Chambers in the *Katanga* and *Bemba* trial judgments.[82] In the *Bemba* case, the International Criminal Court Pre-Trial Chamber found that there was sufficient evidence showing the attack was "directed against" civilians of the Central African Republic.[83] The Chamber concluded that Mouvement de libération du Congo (MLC) soldiers were aware that their victims were civilians, based on direct evidence of civilians being attacked inside their houses or in their courtyards.[84] The Chamber further found that MLC soldiers targeted *primarily* civilians, demonstrated by an attack at one locality where the MLC soldiers did not find any rebel troops that they claimed to be chasing.[85] The term "directed" places its emphasis on the intention of the attack rather than the physical result of the attack.[86] It is the attack, not the acts of the individual perpetrator, which must be "directed against" the target population.[87] The Trial Chamber in *Bemba* later confirmed "that the civilian population was the primary, as opposed to incidental, target of the attack, and in turn, that the attack was directed against the civilian population in the [Central African Republic]".[88] In doing so, it explained that "[w]here an attack is carried out in an area containing both civilians and non-civilians, factors relevant to determining whether an attack was directed against a civilian population include the means and methods used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the form of resistance to the assailants at the time of the attack, and the extent to

---

[77] *Ntaganda*, Decision, 9 June 2014 (see footnote 60 above), para. 24.

[78] *Prosecutor v. Laurent Gbagbo*, Case No. ICC-02/11-01/11, Decision on the confirmation of charges against Laurent *Gbagbo*, 12 June 2014, Pre-Trial Chamber II, International Criminal Court, para. 225.

[79] See Rome Statute; see also International Criminal Court, *Elements of Crimes*, document PCNICC/2000/1/Add.2, p. 5.

[80] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 421 ("The expression 'directed against' specifies that in the context of a crime against humanity the civilian population is the primary object of the attack").

[81] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 76.

[82] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1104; *Bemba*, Judgment, 21 March 2016, (see footnote 58 above), para. 154.

[83] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 94; see also *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), paras. 20-21.

[84] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 94.

[85] *Ibid.*, paras. 95-98.

[86] See, for example, *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 208, footnote 401.

[87] *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 103.

[88] *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 674.

which the attacking force complied with the precautionary requirements of the laws of war".[89]

(19) The word "any" indicates that "civilian population" is to have a wide definition and should be interpreted broadly.[90] An attack can be committed against any civilians, "regardless of their nationality, ethnicity or other distinguishing feature",[91] and can be committed against either nationals or foreigners.[92] Those targeted may "include a group defined by its (perceived) political affiliation".[93] In order to qualify as a "civilian population" during a time of armed conflict, those targeted must be "predominantly" civilian in nature; the presence of certain combatants within the population does not change its character.[94] This approach is in accordance with other rules arising under international humanitarian law. For example, Additional Protocol I to the 1949 Geneva Conventions states: "The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".[95] The Trial Chamber of the International Criminal Tribunal for Rwanda in *Kayishema* found that during a time of peace, "civilian" shall include all persons except those individuals who have a duty to maintain public order and have legitimate means to exercise force to that end at the time they are being attacked.[96] The status of any given victim must be assessed at the time the offence is committed;[97] a person should be considered a civilian if there is any doubt as to his or her status.[98]

---

[89] *Ibid.*, para. 153 (citing to the jurisprudence of various international courts and tribunals).

[90] See, for example, *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 442; *Prosecutor v. Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), para. 547 ("[A] wide definition of 'civilian' and 'population' is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity".); *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 127; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 643.

[91] *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 399 (quoting *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 635); see also *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1103; *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 155.

[92] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 423.

[93] *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 164.

[94] See, for example, *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1105 (holding that the population targeted "must be primarily composed of civilians" and that the "presence of non-civilians in its midst has therefore no effect on its status of civilian population"); *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 442; *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 425 ("the presence of certain non-civilians in its midst does not change the character of the population"); *Kordić*, Judgment, 26 February 2001 (see footnote 46 above), para. 180; *Blaškić*, Judgment, 3 March 2000, (see footnote 54 above), para. 214 ("the presence of soldiers within an intentionally targeted civilian population does not alter the civilian nature of that population"); *Prosecutor v. Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), para. 549 ("the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian"); *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 128; *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 582 ("Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character"); *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 638.

[95] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 50, para. 3.

[96] *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 127 (referring to "all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the [Forces armées rwandaises], the [Rwandese Patriotic Front], the police and the Gendarmerie Nationale").

[97] *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 214 ("[T]he specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian".); see also *Kordić*, Judgment, 26 February 2001 (see footnote 46 above), para. 180 ("individuals who at one time performed acts of resistance may in certain circumstances be victims of a crime against humanity"); *Akayesu*, Judgment, 2 September 1998 (see

(20) "Population" does not mean that the entire population of a given geographical location must be subject to the attack;[99] rather, the term implies the collective nature of the crime as an attack upon multiple victims.[100] As the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia noted in *Gotovina*, the concept means that the attack is upon more than just "a limited and randomly selected number of individuals".[101] The International Criminal Court decisions in the *Bemba* case and the *Situation in the Republic of Kenya* case have adopted a similar approach, declaring that the Prosecutor must establish that the attack was directed against more than just a limited group of individuals.[102]

(21) The first part of draft article 3, paragraph 2 (a), refers to "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population". Although no such language was contained in the statutory definition of crimes against humanity for the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, this language reflects jurisprudence from both these tribunals,[103] and was expressly stated in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the 1998 Rome Statute provides that the "acts" referred to in article 7, paragraph 2 (a), "need not constitute a military attack".[104] The Trial Chamber in *Katanga* stated that "the attack need not necessarily be military in nature and it may involve any form of violence against a civilian population".[105]

(22) The second part of draft article 3, paragraph 2 (a), states that the attack must be "pursuant to or in furtherance of a State or organizational policy to commit such an attack". The requirement of a "policy" element did not appear as part of the definition of crimes against humanity in the statutes of international courts and tribunals until the adoption of the 1998 Rome Statute.[106] While the Statutes of the International Criminal Tribunal for the

---

footnote 53 above), para. 582 (finding that civilian population includes "members of the armed forces who laid down their arms and those persons placed *hors de combat*").

[98] *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 426.

[99] See *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 82; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 77; *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 424; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 644; see also *Yearbook … 1994*, vol. II (Part Two), p. 40, para. (14) of the commentary to art. 21 (defining crimes against humanity as "inhumane acts of a very serious character involving widespread or systematic violations aimed at the civilian population *in whole or in part*" (emphasis added)).

[100] See *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 644.

[101] *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, Case No. IT-06-90-T, Judgment, 15 April 2011, Trial Chamber I, International Criminal Tribunal for the Former Yugoslavia, para. 1704.

[102] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 81; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 77; *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 154.

[103] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 415 (defining attack as "a course of conduct involving the commission of acts of violence"); *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 122 (defining attack as the "event in which the enumerated crimes must form part"); *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 581 ("The concept of 'attack' may be defined as an unlawful act of the kind enumerated [in the Statute] … An attack may also be non violent in nature, like imposing a system of apartheid … or exerting pressure on the population to act in a particular manner").

[104] See International Criminal Court, *Elements of Crimes*, p. 5.

[105] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1101.

[106] Article 6 (c) of the Nürnberg Charter contains no explicit reference to a plan or policy. The Nürnberg Judgment, however, did use a "policy" descriptor when discussing article 6 (c) in the context of the concept of the "attack" as a whole. See *Judgment of 30 September 1946* (see footnote 29 above), p. 493 ("The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out"). Article II (1) (c) of Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity also contains no reference to a plan or policy in its definition of crimes against humanity. Control Council Law No. 10 on Punishment of Persons Guilty

Former Yugoslavia and the International Criminal Tribunal for Rwanda contained no policy requirement in their definition of crimes against humanity,[107] some early jurisprudence required it.[108] Indeed, the *Tadić* Trial Chamber provided an important discussion of the policy element early in the work of the International Criminal Tribunal for the Former Yugoslavia, one that would later influence the drafting of the 1998 Rome Statute. The Trial Chamber found that

> the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts ... Importantly, however, such a policy need not be formalized and can be deduced from the way in which the acts occur.[109]

The Trial Chamber further noted that, because of the policy element, such crimes "cannot be the work of isolated individuals alone".[110] Later jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, however, downplayed the policy element, regarding it as sufficient simply to prove the existence of a widespread or systematic attack.[111]

(23) Prior to the 1998 Rome Statute, the work of the Commission in its draft codes tended to require a policy element. The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind defined crimes against humanity as: "Inhuman acts such as murder, extermination, enslavement, deportation or persecutions, committed against any civilian population on social, political, racial or cultural grounds *by the authorities of a State or by private individuals acting at the instigation or with the toleration of such authorities*".[112] The Commission decided to include the State instigation or tolerance requirement in order to exclude inhumane acts committed by private persons on their own without any State involvement.[113] At the same time, the definition of crimes against humanity included in the 1954 draft Code of Offences against the Peace and Security of Mankind did not include any requirement of scale ("widespread") or systematicity.

(24) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also recognized a policy requirement, defining crimes against humanity as "any of the following acts, when committed in a systematic manner or on a large scale and instigated or directed by a Government or by an organization or group".[114] The Commission

---

of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, in *Official Gazette of the Control Council for Germany*, vol. 3, p. 52 (1946).

[107] The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia determined that there was no policy element on crimes against humanity in customary international law, see *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 98 ("There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes".), although that position has been criticized in writings.

[108] *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), paras. 644, 653-655 and 626.

[109] *Ibid.*, para. 653.

[110] *Ibid.*, para. 655 (citing to *Prosecutor v. Dragan Nikolić a/k/a "Jenki"*, Case No. IT-94-2-R61, Review of indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 26).

[111] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 98; *Kordić*, Judgment, 26 February 2001 (see footnote 46 above), para. 182 (finding that "the existence of a plan or policy should better be regarded as indicative of the systematic character of offences charged as crimes against humanity"); *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 124 ("For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan".); *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above), para. 580.

[112] *Yearbook ... 1954*, vol. II, p. 150 (emphasis added).

[113] *Ibid.*

[114] *Yearbook ... 1996*, vol. II (Part Two), p. 47 (emphasis added).

included this requirement to exclude inhumane acts committed by an individual "acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or organization".[115] In other words, the policy element sought to exclude "ordinary" crimes of individuals acting on their own initiative and without any connection to a State or organization.

(25) Draft article 3, paragraph 2 (a), contains the same policy element as set forth in article 7, paragraph 2 (a), of the 1998 Rome Statute. The Elements of Crimes under the 1998 Rome Statute provide that a "'policy to commit such attack' requires that the State or organization actively promote or encourage such an attack against a civilian population",[116] and that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".[117]

(26) This "policy" element has been addressed in several cases at the International Criminal Court.[118] In the 2014 judgment in *Katanga*, an International Criminal Court Trial Chamber stressed that the policy requirement is not synonymous with "systematic", since that would contradict the disjunctive requirement in article 7 of the 1998 Rome Statute of a "widespread" or "systematic" attack.[119] Rather, while "systematic" requires high levels of organization and patterns of conduct or recurrence of violence,[120] to "establish a 'policy', it need be demonstrated only that the State or organisation meant to commit an attack against a civilian population. An analysis of the systematic nature of the attack therefore goes beyond the existence of any policy seeking to eliminate, persecute or undermine a community".[121] Further, the "policy" requirement does not require formal designs or pre-established plans, can be implemented by action or inaction, and can be inferred from the circumstances.[122] The Trial Chamber found that the policy need not be formally established or promulgated in advance of the attack and can be deduced from the repetition of acts, from preparatory activities, or from a collective mobilization.[123] Moreover, the policy need not be concrete or precise, and it may evolve over time as circumstances unfold.[124] Furthermore, the Trial Chamber in *Bemba* held that the requirement that the course of conduct was committed pursuant to or in furtherance of the State or organizational policy is satisfied not only where a perpetrator deliberately acts to further the policy, but also where a perpetrator has engaged in conduct envisaged by the policy, and with knowledge thereof.[125]

(27) Similarly, in its decision confirming the indictment of Laurent Gbagbo, an International Criminal Court Pre-Trial Chamber held that "policy" should not be conflated with "systematic".[126] Specifically, the Trial Chamber stated that "evidence of planning, organisation or direction by a State or organisation may be relevant to prove both the policy

---

[115] *Ibid.* In explaining its inclusion of the policy requirement, the Commission noted: "It would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18".

[116] International Criminal Court, *Elements of Crimes*, p. 9.

[117] *Ibid.* Other precedents also emphasize that deliberate failure to act can satisfy the policy element. See *Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), paras. 554-555 ("approved", "condoned", "explicit or implicit approval"); *Yearbook … 1954*, vol. II, p. 150 (art. 2 (11)) ("toleration"); Security Council, Report of the Commission of Experts Established Pursuant to Security Council resolution 780 (1992), document S/1994/674, para. 85.

[118] See, for example, *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 24; *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 81; *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 396.

[119] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1112; see also *ibid.*, para. 1101; *Gbagbo*, Decision, 12 June 2014 (see footnote 78 above), para. 208.

[120] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), paras. 1111-1113.

[121] *Ibid.*, para. 1113.

[122] *Ibid.*, paras. 1108-1109 and 1113.

[123] *Ibid.*, para. 1109; see also *Gbagbo*, Decision, 12 June 2014 (see footnote 78 above), paras. 211-212, and 215.

[124] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1110.

[125] *Bemba*, Judgment, 15 June 2016 (see footnote 58 above), para. 161.

[126] *Gbagbo*, Judgment, 12 June 2014 (see footnote 78 above), paras. 208 and 216.

and the systematic nature of the attack, although the two concepts should not be conflated as they serve different purposes and imply different thresholds under article 7 (1) and (2) (a) of the Statute".[127] The policy element requires that the acts be "linked" to a State or organization,[128] and it excludes "spontaneous or isolated acts of violence", but a policy need not be formally adopted[129] and proof of a particular rationale or motive is not required.[130] In the *Bemba* case, an International Criminal Court Pre-Trial Chamber found that the attack was pursuant to an organizational policy based on evidence establishing that the MLC troops "carried out attacks following the same pattern".[131] The Trial Chamber later found that the MLC troops knew that their individual acts were part of a broader attack directed against the civilian population in the Central African Republic.[132]

(28) The second part of draft article 3, paragraph 2 (a), refers to either a "State" or "organizational" policy to commit such an attack, as does article 7, paragraph 2 (a), of the 1998 Rome Statute. In its *Situation in the Republic of Kenya* decision, an International Criminal Court Pre-Trial Chamber suggested that the meaning of "State" in article 7, paragraph 2 (a), is "self-explanatory".[133] The Chamber went on to note that a policy adopted by regional or local organs of the State could satisfy the requirement of State policy.[134]

(29) Jurisprudence from the International Criminal Court suggests that "organizational" includes any organization or group with the capacity and resources to plan and carry out a widespread or systematic attack. For example, a Pre-Trial Chamber in *Katanga* stated: "Such a policy may be made either by groups of persons who govern a specific territory or by any organisation with the capability to commit a widespread or systematic attack against a civilian population".[135] An International Criminal Court Trial Chamber in *Katanga* held that the organization must have "sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts" and "a set of structures or mechanisms, whatever those may be, that are sufficiently efficient to ensure the coordination necessary to carry out an attack directed against a civilian population".[136]

(30) In its *Situation in the Republic of Kenya* decision, a majority of an International Criminal Court Pre-Trial Chamber rejected the idea that "only State-like organizations may qualify" as organizations for the purpose of article 7, paragraph 2 (a), and further stated that "the formal nature of a group and the level of its organization should not be the defining criterion. Instead ... a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values".[137] In 2012, an International Criminal Court Pre-Trial Chamber in *Ruto* stated that, when determining whether a particular group qualifies as an "organization" under article 7 of the 1998 Rome Statute:

---

[127] *Ibid.*, para. 216.

[128] *Ibid.*, para. 217.

[129] *Ibid.*, para. 215.

[130] *Ibid.*, para. 214.

[131] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 115.

[132] *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 669.

[133] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 89.

[134] *Ibid.*

[135] *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 396 (citing case law of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, as well as the Commission's 1991 draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1991*, vol. II (Part Two), p. 103); see also *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 81.

[136] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1119.

[137] *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 90. This understanding was similarly adopted by the Trial Chamber in the *Katanga* judgment, which stated: "That the attack must further be characterised as widespread or systematic does not, however, mean that the organisation that promotes or encourages it must be structured so as to assume the characteristics of a State". *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1120. The Trial Chamber also found that "the 'general practice accepted as law' ... adverts to crimes against humanity committed by States and organisations that are not specifically defined as requiring quasi-State characteristics". *Ibid.*, para. 1121.

> the Chamber may take into account a number of factors, *inter alia*: (i) whether the group is under a responsible command, or has an established hierarchy; (ii) whether the group possesses, in fact, the means to carry out a widespread or systematic attack against a civilian population; (iii) whether the group exercises control over part of the territory of a State; (iv) whether the group has criminal activities against the civilian population as a primary purpose; (v) whether the group articulates, explicitly or implicitly, an intention to attack a civilian population; (vi) whether the group is part of a larger group, which fulfils some or all of the abovementioned criteria.[138]

(31) As a consequence of the "policy" potentially emanating from a non-State organization, the definition set forth in paragraphs 1 to 3 of draft article 3 does not require that the offender be a State official or agent. This approach is consistent with the development of crimes against humanity under international law. The Commission, commenting in 1991 on the draft provision on crimes against humanity for what would become the 1996 draft Code of Crimes against the Peace and Security of Mankind, stated "that the draft article does not confine possible perpetrators of the crimes to public officials or representatives alone" and that it "does not rule out the possibility that private individuals with *de facto* power or organized in criminal gangs or groups might also commit the kind of systematic or mass violations of human rights covered by the article; in that case, their acts would come under the draft Code".[139] As discussed previously, the 1996 draft Code added the requirement that, to be crimes against humanity, the inhumane acts must be "instigated or directed by a Government *or by any organization or group*".[140] In its commentary to this requirement, the Commission noted: "The instigation or direction of a Government or any organization or group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of a State".[141]

(32) Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia accepted the possibility of non-State actors being prosecuted for crimes against humanity. For example, a Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case stated that, "the law in relation to crimes against humanity has developed to take into account forces which, although not those of the legitimate government, have *de facto* control over, or are able to move freely within, defined territory".[142] That finding was echoed in the *Limaj* case, where the Trial Chamber viewed the defendant members of the Kosovo Liberation Army as prosecutable for crimes against humanity.[143]

(33) In the *Ntaganda* case at the International Criminal Court, charges were confirmed against a defendant associated with two paramilitary groups, the Union des patriotes congolais and the Forces patriotiques pour la libération du Congo in the Democratic Republic of the Congo.[144] Similarly, in the *Mbarushimana* case, the prosecutor pursued charges against a defendant associated with the Forces démocratiques de libération du Rwanda, described, according to its statute, as an "armed group seeking to 'reconquérir et défendre la souveraineté nationale' of Rwanda".[145] In the case against Joseph Kony relating

---

[138] *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 185; see also *Situation in the Republic of Kenya*, Decision, 31 March 2010 (see footnote 58 above), para. 93; *Situation in the Republic of Côte d'Ivoire*, Case No. ICC-02/11, Corrigendum to the Decision pursuant to Article 15 of the 1998 Rome Statute on the authorization of an investigation into the situation in the Republic of Côte d'Ivoire, 15 November 2011, Pre-Trial Chamber III, International Criminal Court, paras. 45-46.

[139] *Yearbook ... 1991*, vol. II (Part Two), pp. 103-104.

[140] *Yearbook ... 1996*, vol. II (Part Two), p. 47 (art. 18) (emphasis added).

[141] *Ibid.*

[142] *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 654. For further discussion of non-State perpetrators, see *ibid.*, para. 655.

[143] *Prosecutor v. Fatmir Limaj, Haradin Bala and Isak Musliu*, Case No. IT-03-66-T, Judgment, 30 November 2005, Trial Chamber II, International Criminal Tribunal for Former Yugoslavia, paras. 212-213.

[144] *Ntaganda*, Decision, 13 July 2012 (see footnote 61 above), para. 22.

[145] *Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, Case No. ICC-01/04-01/10, 16 December 2011, Pre-Trial Chamber I, International Criminal Court, para. 2.

to the situation in Uganda, the defendant is allegedly associated with the Lord's Resistance Army, "an armed group carrying out an insurgency against the Government of Uganda and the Ugandan Army"[146] which "is organised in a military-type hierarchy and operates as an army".[147] With respect to the situation in Kenya, a Pre-Trial Chamber confirmed charges of crimes against humanity against defendants due to their association in a "network" of perpetrators "comprised of eminent [Orange Democratic Movement Party (ODM)] political representatives, representatives of the media, former members of the Kenyan police and army, Kalenjin elders and local leaders".[148] Likewise, charges were confirmed with respect to other defendants associated with "coordinated attacks that were perpetrated by the Mungiki and pro-Party of National Unity ('PNU') youth in different parts of Nakuru and Naivasha" that "were targeted at perceived [ODM] supporters using a variety of means of identification such as lists, physical attributes, roadblocks and language".[149]

"With knowledge of the attack"

(34) The third overall requirement is that the perpetrator must commit the act "with knowledge of the attack". Jurisprudence from the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda has concluded that the perpetrator must have knowledge that there is an attack on the civilian population and, further, that his or her act is a part of that attack.[150] This two-part approach is reflected in the Elements of Crimes under the 1998 Rome Statute, which for each of the proscribed acts requires as that act's last element: "The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population". Even so,

> the last element should not be interpreted as requiring proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organization. In the case of an emerging widespread or systematic attack against a civilian population, the intent clause of the last element indicates that this mental element is satisfied if the perpetrator intended to further such an attack.[151]

(35) In its decision confirming the charges against Laurent *Gbagbo*, an International Criminal Court Pre-Trial Chamber found that "it is only necessary to establish that the person had knowledge of the attack in general terms".[152] Indeed, it need not be proven that the perpetrator knew the specific details of the attack;[153] rather, the perpetrator's knowledge may be inferred from circumstantial evidence.[154] Thus, when finding in the *Bemba* case that the MLC troops acted with knowledge of the attack, an International Criminal Court Pre-

---

[146] *Situation in Uganda*, Case No. ICC-02/04-01/05, Warrant of arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, 27 September 2005, Pre-Trial Chamber II, International Criminal Court, para. 5.

[147] *Ibid.*, para. 7.

[148] *Ruto*, Decision, 23 January 2012 (see footnote 64 above), para. 182.

[149] *Situation in the Republic of Kenya in the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11, Decision on the confirmation of charges pursuant to Article 61 (7) (a) and (b) of the Rome Statute, 23 January 2012, Pre-Trial Chamber II, International Criminal Court, para. 102.

[150] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 418; *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 133.

[151] International Criminal Court, *Elements of Crimes*, at p. 9.

[152] *Gbagbo*, Decision, 12 June 2014 (see footnote 78 above), para. 214.

[153] *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 434 (finding that the knowledge requirement "does not entail knowledge of the details of the attack").

[154] See *Blaškić*, Judgment, 3 March 2000 (see footnote 54 above), para. 259 (finding that knowledge of the broader context of the attack may be surmised from a number of facts, including "the nature of the crimes committed and the degree to which they are common knowledge"); *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 657 ("While knowledge is thus required, it is examined on an objective level and factually can be implied from the circumstances".); see also *Kayishema*, Judgment, 21 May 1999 (see footnote 55 above), para. 134 (finding that "actual or constructive knowledge of the broader context of the attack" is sufficient).

Trial Chamber stated that the troops' knowledge could be "inferred from the methods of the attack they followed", which reflected a clear pattern.[155] In the *Katanga* case, an International Criminal Court Pre-Trial Chamber found that

> knowledge of the attack and the perpetrator's awareness that his conduct was part of such attack may be inferred from circumstantial evidence, such as: the accused's position in the military hierarchy; his assuming an important role in the broader criminal campaign; his presence at the scene of the crimes; his references to the superiority of his group over the enemy group; and the general historical and political environment in which the acts occurred.[156]

(36) Furthermore, the personal motive of the perpetrator for taking part in the attack is irrelevant; the perpetrator does not need to share the purpose or goal of the broader attack.[157] According to the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Kunarac*, evidence that the perpetrator committed the prohibited acts for personal reasons could at most "be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack".[158] It is the perpetrator's knowledge or intent that his or her act is part of the attack that is relevant to satisfying this requirement. Additionally, this element will be satisfied where it can be proven that the underlying offence was committed by directly taking advantage of the broader attack, or where the commission of the underlying offence had the effect of perpetuating the broader attack.[159] For example, in the *Kunarac* case, the perpetrators were accused of various forms of sexual violence, acts of torture, and enslavement in regard to Muslim women and girls. A Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia found that the accused had the requisite knowledge because they not only knew of the attack against the Muslim civilian population, but also perpetuated the attack "by directly taking advantage of the situation created" and "fully embraced the ethnicity-based aggression".[160] Likewise, an International Criminal Court Trial Chamber has held that the perpetrator must know that the act is part of the widespread or systematic attack against the civilian population, but the perpetrator's motive is irrelevant for the act to be characterized as a crime against humanity. It is not necessary for the perpetrator to have knowledge of all the characteristics or details of the attack, nor is it required for the perpetrator to subscribe to the "State or the organisation's criminal design".[161]

Prohibited acts

(37) Like article 7 of the 1998 Rome Statute, draft article 3, paragraph 1, at subparagraphs (a)-(k), lists the prohibited acts for crimes against humanity. These prohibited acts also appear as part of the definition of crimes against humanity contained in article 18 of the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, although the language differs slightly. An individual who commits one of these acts can commit a crime against humanity; the individual need not have committed multiple acts, but the individual's act must be "part of" a widespread or systematic attack directed against any civilian population.[162] Determining whether the requisite nexus exists requires making "an objective assessment, considering, in particular, the characteristics, aims, nature and/or consequences of the act. Isolated acts that clearly differ in their context and circumstances from other acts that occur during an attack fall outside the scope of" draft

---

[155] *Bemba*, Decision, 15 June 2009 (see footnote 58 above), para. 126; see *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), paras. 166-169.

[156] *Katanga*, Decision, 30 September 2008 (see footnote 59 above), para. 402.

[157] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 103; *Kupreškić*, Judgment, 14 January 2000 (see footnote 38 above), para. 558.

[158] *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 103.

[159] See, for example, *Kunarac*, Judgment, 22 February 2001 (see footnote 59 above), para. 592.

[160] *Ibid.*

[161] *Katanga*, Judgment, 7 March 2014 (see footnote 59 above), para. 1125.

[162] See, for example, *Kunarac*, Judgment, 12 June 2002 (see footnote 72 above), para. 100; *Tadić*, Opinion and Judgment, 7 May 1997 (see footnote 54 above), para. 649.

article 3, paragraph 1.[163] The offence does not need to be committed in the heat of the attack against the civilian population to satisfy this requirement; the offence can be part of the attack if it can be sufficiently connected to the attack.[164]

Definitions within the definition

(38) As noted above, draft article 3, paragraph 2 (a), defines "attack directed against any civilian population" for the purpose of draft article 3, paragraph 1. The remaining subparagraphs (b)-(i) of draft article 3, paragraph 2, define further terms that appear in paragraph 1, specifically: "extermination"; "enslavement"; "deportation or forcible transfer of population"; "torture"; "forced pregnancy"; "persecution"; "the crime of apartheid"; and "enforced disappearance of persons". Further, draft article 3, paragraph 3, provides a definition for the term "gender". These definitions also appear in article 7 of the 1998 Rome Statute and were viewed by the Commission as relevant for retention in draft article 3.

Paragraph 4

(39) Paragraph 4 of draft article 3 provides: "This draft article is without prejudice to any broader definition provided for in any international instrument or national law". This provision is similar to article 1, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application".[165] Article 10 of the 1998 Rome Statute (appearing in Part II on "Jurisdiction, admissibility, and applicable law") also contains a "without prejudice clause", which reads: "Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute".

(40) Paragraph 4 is meant to ensure that the definition of "crimes against humanity" set forth in draft article 3 does not call into question any broader definitions that may exist in other international instruments or national legislation. "International instrument" is to be understood in the broad sense and not only in the sense of being a binding international agreement. For example, the definition of "enforced disappearance of persons" as contained in draft article 3 follows article 7 of the 1998 Rome Statute but differs from the definition contained in the 1992 Declaration on the Protection of All Persons from Enforced Disappearance,[166] the 1994 Inter-American Convention on Forced Disappearance of Persons[167] and in the 2006 International Convention for the Protection of All Persons against Enforced Disappearance.[168] Those differences principally are that the latter instruments do not include the element "with the intention of removing them from the protection of the law", do not include the words "for a prolonged period of time" and do not refer to organizations as potential perpetrators of the crime when they act without State participation.

---

[163] *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), para. 165.

[164] See, for example, *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 5 May 2009, Appeals Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 41; *Prosecutor v. Mladen Naletilić aka "Tuta" and Vinko Martinović aka "Štela"*, Case No. IT-98-34-T, Judgment, 31 March 2003, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, para. 234, *Judicial Supplement No. 42*, June 2003; *Mrkšić*, Judgment, 27 September 2007 (see footnote 55 above), para. 438; *Tadić*, Judgment, 15 July 1999, (see footnote 46 above), para. 249.

[165] Convention against Torture, art. 1, para. 2.

[166] Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992.

[167] Inter-American Convention on Forced Disappearance of Persons (Belem, 9 June 1994), Organization of American States, *Treaty Series*, No. 60.

[168] International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), United Nations, *Treaty Series*, vol. 2716, No. 48088, p. 3.

(41) In the light of such differences, the Commission thought it prudent to include draft article 3, paragraph 4. In essence, while the first three paragraphs of draft article 3 define crimes against humanity for the purpose of the draft articles, this is without prejudice to broader definitions in international instruments or national laws. Thus, if a State wishes to adopt a broader definition in its national law, the present draft articles do not preclude it from doing so. At the same time, an important objective of the draft articles is the harmonization of national laws, so that they may serve as the basis for robust inter-State cooperation. Any elements adopted in a national law, which would not fall within the scope of the present draft articles, would not benefit from the provisions set forth within them, including on extradition and mutual legal assistance.

Article 4
Obligation of prevention

1. Each State undertakes to prevent crimes against humanity, in conformity with international law, including through:

(a) effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction; and

(b) cooperation with other States, relevant intergovernmental organizations, and, as appropriate, other organizations.

2. No exceptional circumstances whatsoever, such as armed conflict, internal political instability or other public emergency, may be invoked as a justification of crimes against humanity.

Commentary

(1) Draft article 4 sets forth an obligation of prevention with respect to crimes against humanity. In considering such an obligation, the Commission viewed it as pertinent to survey existing treaty practice concerning the prevention of crimes and other acts. In many instances, those treaties address acts that, when committed under certain circumstances, can constitute crimes against humanity (for example, genocide, torture, apartheid, or enforced disappearance). As such, the obligation of prevention set forth in those treaties extends as well to prevention of the acts in question when they also qualify as crimes against humanity.

(2) An early significant example of an obligation of prevention may be found in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which provides in article I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish".[169] Further, article V provides: "The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III". Article VIII provides: "Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". As such, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide contains within it several elements relating to prevention: a general obligation to prevent genocide; an obligation to enact national measures to give effect to the provisions of the Convention; and a provision on cooperation of States parties with the United Nations for the prevention of genocide.

(3) Such an obligation of prevention is a feature of most multilateral treaties addressing crimes since the 1960s. Examples include: the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation;[170] the 1973 Convention on the

---

[169] Genocide Convention, art. I.

[170] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971), United Nations, *Treaty Series*, vol. 974, No. 14118, p. 177. Article 10, paragraph 1,

Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents;[171] the 1973 Convention on the Prevention and Punishment of the Crime of Apartheid;[172] the 1979 International Convention against the Taking of Hostages;[173] the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[174] the 1985 Inter-American Convention to Prevent and Punish Torture;[175] the 1994 Inter-American Convention on the Forced Disappearance of Persons;[176] the 1994 Convention on the Safety of United Nations and Associated Personnel;[177] the 1997 International Convention on the Suppression of Terrorist Bombings;[178] the 2000 United Nations Convention against Transnational Organized Crime;[179] the 2000 Protocol to

---

provides: "Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1".

[171] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167, art. 4 ("States Parties shall co-operate in the prevention of the crimes set forth in article 2, particularly by: (a) taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories").

[172] International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243, art. IV ("The States Parties to the present Convention undertake ... (a) To adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid and similar segregationist policies or their manifestations and to punish persons guilty of that crime").

[173] International Convention against the Taking of Hostages (New York, 17 December 1979), United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205, art. 4, para. 1 ("States Parties shall co-operate in the prevention of the offences set forth in article 1, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of ... offences ... including measures to prohibit in their territories illegal activities of persons, groups and organizations that encourage, instigate, organize or engage in the perpetration of acts of taking of hostages").

[174] Convention against Torture, art. 2, para. 1 ("Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction").

[175] Inter-American Convention to Prevent and Punish Torture (Cartagena, 9 December 1985), Organization of American States, *Treaty Series*, No. 67, art. 1 ("The State Parties undertake to prevent and punish torture in accordance with the terms of this Convention". Article 6 provides: "The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction").

[176] Inter-American Convention on Forced Disappearance of Persons, art. 1 ("The States Parties to this Convention undertake ... (c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons; (d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention").

[177] Convention on the Safety of United Nations and Associated Personnel (New York, 9 December 1994), United Nations, *Treaty Series*, vol. 2051, No. 35457, p. 363, art. 11 ("States Parties shall cooperate in the prevention of the crimes set out in article 9, particularly by: (a) Taking all practicable measures to prevent preparations in their respective territories for the commission of those crimes within or outside their territories; and (b) Exchanging information in accordance with their national law and coordinating the taking of administrative and other measures as appropriate to prevent the commission of those crimes").

[178] International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256, art. 15 ("States Parties shall cooperate in the prevention of the offences set forth in article 2").

[179] United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2225, No. 39574, p. 209, art. 9, para. 1 ("In addition to the measures set forth in article 8 of this Convention, each State Party shall, to the extent appropriate and consistent with its legal system, adopt legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials"); art. 9, para. 2 ("Each State Party shall take measures to ensure effective action by its authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions"); art. 29, para. 1 ("Each State Party shall, to the extent necessary, initiate, develop or improve specific training programmes for its law enforcement personnel, including prosecutors, investigating magistrates and customs personnel, and other personnel charged with the prevention, detection and

Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[180] the 2002 Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[181] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[182]

(4) Some multilateral human rights treaties, even though not focused on the prevention and punishment of crimes as such, contain obligations to prevent and suppress human rights violations. Examples include: the 1966 International Convention on the Elimination of All Forms of Racial Discrimination;[183] the 1979 Convention on the Elimination of All Forms of Discrimination against Women;[184] and the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.[185] Some

---

control of the offences covered by this Convention"); art. 31, para. 1 ("States Parties shall endeavour to develop and evaluate national projects and to establish and promote best practices and policies aimed at the prevention of transnational organized crime").

[180] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), United Nations, *Treaty Series*, vol. 2237, No. 39574, p. 319, art. 9, para. 1 ("States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization").

[181] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 18 December 2002), United Nations, *Treaty Series*, vol. 2375, No. 24841, p. 237. The preamble provides: "Recalling that the effective prevention of torture and other cruel, inhuman or degrading treatment or punishment requires education and a combination of various legislative, administrative, judicial and other measures". Article 3 provides: "Each State party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment".

[182] International Convention for the Protection of All Persons from Enforced Disappearance. The preamble provides: "Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance". Article 23 provides: "1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to: (a) Prevent the involvement of such officials in enforced disappearances; (b) Emphasize the importance of prevention and investigations in relation to enforced disappearances; (c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized. 2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished. 3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy".

[183] International Convention on the Elimination of All Forms of Racial Discrimination (New York, 7 March 1966), United Nations, *Treaty Series*, vol. 660, p. 195, art. 3 ("States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction").

[184] Convention on the Elimination of All Forms of Discrimination against Women (New York, 18 December 1979), United Nations, *Treaty Series*, vol. 1249, No. 20378, p. 13, art. 2 ("States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women". Article 3 provides: "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men").

[185] Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul, 5 November 2011), *Council of Europe Treaty Series*, No. 210, art. 4, para. 2 ("Parties condemn all forms of discrimination against women and take, without delay, the necessary legislative and other measures to prevent it, in particular by: embodying in their national constitutions or other appropriate legislation the principle of equality between women and men and ensuring the practical realisation of this principle; prohibiting discrimination against women, including through the

treaties do not refer expressly to "prevention" or "elimination" of the act but, rather, focus on an obligation to take appropriate legislative, administrative, and other measures to "give effect" to or to "implement" the treaty, which may be seen as encompassing necessary or appropriate measures to prevent the act. Examples include the 1966 International Covenant on Civil and Political Rights[186] and the 1989 Convention on the Rights of the Child.[187]

(5) International courts and tribunals have addressed these obligations of prevention. The International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* noted that the duty to punish in the context of that convention is connected to but distinct from the duty to prevent. While "one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent",[188] the Court found that "the duty to prevent genocide and the duty to punish its perpetrators ... are ... two distinct yet connected obligations".[189] Indeed, the "obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty".[190]

(6) Such treaty practice, jurisprudence, and the well-settled acceptance by States that crimes against humanity are crimes under international law that should be punished whether or not committed in time of armed conflict, and whether or not criminalized under national law, imply that States have undertaken an obligation to prevent crimes against humanity. Paragraph 1 of draft article 4, therefore, formulates an obligation of prevention in a manner similar to that set forth in article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, by beginning: "Each State undertakes to prevent crimes against humanity ...".

(7) In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, the International Court of Justice analysed the meaning of "undertake to prevent" as contained in article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. At the provisional measures phase, the Court determined that such an undertaking imposes "a clear obligation" on the parties "to do all in their power to prevent the commission of any such acts in the future".[191] At the merits phase, the Court described the ordinary meaning of the word "undertake" in that context as

> to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties ... It is not merely hortatory or purposive. The undertaking is unqualified ... and it is not to be read merely as an introduction to later express references to legislation, prosecution and extradition. Those features

---

use of sanctions, where appropriate, abolishing laws and practices which discriminate against women").

[186] International Covenant on Civil and Political Rights (New York, 16 December 1966), United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171, art. 2, para. 2 ("Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant").

[187] Convention on the Rights of the Child (New York, 20 November 1989), United Nations, *Treaty Series*, vol. 1577, No. 27531, p. 3, art. 4 ("States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention").

[188] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, at p. 219, para. 426.

[189] *Ibid.*, para. 425.

[190] *Ibid.*, p. 220, para. 427.

[191] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 3, at p. 22, para. 45.

> support the conclusion that Article I, in particular its undertaking to prevent, creates obligations distinct from those which appear in the subsequent Articles.[192]

The undertaking to prevent crimes against humanity, as formulated in paragraph 1 of draft article 4, is intended to express the same kind of legally binding effect upon States; it, too, is not merely hortatory or purposive, and is not merely an introduction to later draft articles.

(8) In the same case, the International Court of Justice further noted that, when engaging in measures of prevention, "it is clear that every State may only act within the limits permitted by international law".[193] The Commission deemed it important to express that requirement explicitly in paragraph 1 of draft article 4, and therefore has included a clause indicating that any measures of prevention must be "in conformity with international law". Thus, the measures undertaken by a State to fulfil this obligation must be consistent with the rules of international law, including rules on the use of force set forth in the Charter of the United Nations, international humanitarian law, and human rights law. The State is only expected to take such measures as it legally can take under international law to prevent crimes against humanity.

(9) As set forth in paragraph 1 of draft article 4, this obligation of prevention either expressly or implicitly contains four elements. First, by this undertaking, States have an obligation not "to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law".[194] According to the International Court of Justice, when considering the analogous obligation of prevention contained in article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide:

> Under Article I the States parties are bound to prevent such an act, which it describes as 'a crime under international law', being committed. The Article does not *expressis verbis* require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as 'a crime under international law': by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide. That obligation requires the States parties, *inter alia*, to employ the means at their disposal, in circumstances to be described more specifically later in this Judgment, to prevent persons or groups not directly under their authority from committing an act of genocide or any of the other acts mentioned in Article III. It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.[195]

(10) The Court also decided that the substantive obligation reflected in article I was not, on its face, limited by territory but, rather, applied "to a State wherever it may be acting or may be able to act in ways appropriate to meeting the obligation […] in question".[196]

(11) A breach of this obligation not to commit directly such acts implicates the responsibility of the State if the conduct at issue is attributable to the State pursuant to the rules on State responsibility. Indeed, in the context of disputes that may arise under the

---

[192] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 188 above), p. 43, at p. 111, para. 162.

[193] *Ibid.*, p. 221, para. 430.

[194] *Ibid.*, p. 113, para. 166.

[195] *Ibid.*

[196] *Ibid.*, p. 120, para. 183.

1948 Convention on the Prevention and Punishment of the Crime of Genocide, article IX refers, *inter alia*, to disputes "relating to the responsibility of a State for genocide". Although much of the focus of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide is upon prosecuting individuals for the crime of genocide, the International Court of Justice stressed that the breach of the obligation to prevent is not a *criminal* violation by the State but, rather, concerns a breach of international law that engages State responsibility.[197] The Court's approach is consistent with views previously expressed by the Commission,[198] including in the commentary to the 2001 articles on responsibility of States for internationally wrongful acts: "Where crimes against international law are committed by State officials, it will often be the case that the State itself is responsible for the acts in question or for failure to prevent or punish them".[199]

(12) Second, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation "to employ the means at their disposal ... to prevent persons or groups not directly under their authority from committing" such acts.[200] In this instance, the State party is expected to use its best efforts (a due diligence standard) when it has a "capacity to influence effectively the action of persons likely to commit, or already committing, genocide", which in turn depends on the State party's geographic, political and other links to the persons or groups at issue.[201] Such a standard with respect to the obligation of prevention in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was analysed by the International Court of Justice as follows:

> [I]t is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of States parties is rather to employ all means reasonably available to them, so as to prevent genocide so far as possible. A State does not incur responsibility simply because the desired result is not achieved; responsibility is however incurred if the State manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide. In this area the notion of 'due diligence,' which calls for an assessment *in concreto*, is of critical importance. Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position *vis-à-vis* the situations and persons facing the danger, or the reality, of genocide. On the other hand, it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent,

---

[197] *Ibid.*, p. 114, para. 167 (finding that international responsibility is "quite different in nature from criminal responsibility").

[198] *Yearbook … 1998*, vol. II (Part Two), p. 65 para. 248 (finding that the Genocide Convention "did not envisage State crime or the criminal responsibility of States in its article IX concerning State responsibility").

[199] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, p. 142, para. (3) of the commentary to art. 58.

[200] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (see footnote 188 above), p. 43, at p. 113, para. 166.

[201] *Ibid.*, p. 221, para. 430.

> might have achieved the result — averting the commission of genocide — which the efforts of only one State were insufficient to produce.[202]

At the same time, the Court maintained that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed".[203]

(13) Third, and following from the above, the undertaking set forth in paragraph 1 of draft article 4 obliges States to pursue actively and in advance measures designed to help prevent the offence from occurring, such as by taking "effective legislative, administrative, judicial or other preventive measures in any territory under its jurisdiction", as indicated in subparagraph (a). This text is inspired by article 2, paragraph 1, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction".[204]

(14) The term "other preventive measures" rather than just "other measures" is used to reinforce the point that the measures at issue in this clause relate solely to prevention. The term "effective" implies that the State is expected to keep the measures that it has taken under review and, if they are deficient, to improve them through more effective measures. In commenting on the analogous provision in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has stated:

> States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State Party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted.[205]

(15) As to the specific types of measures that shall be pursued by a State, in 2015 the Human Rights Council adopted a resolution on the prevention of genocide[206] that provides some insights into the kinds of measures that are expected in fulfilment of article I of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Among other things, the resolution: (a) reiterated "the responsibility of each individual State to protect its population from genocide, which entails the prevention of such a crime, including incitement to it, through appropriate and necessary means";[207] (b) encouraged "Member States to build their capacity to prevent genocide through the development of individual expertise and the creation of appropriate offices within Governments to strengthen the work on prevention";[208] and (c) encouraged "States to consider the appointment of focal points on the prevention of genocide, who could cooperate and exchange information and best practices among themselves and with the Special Adviser to

---

[202] *Ibid.*

[203] *Ibid.*, p. 221, para. 431; see *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, p. 27 (*Draft articles on responsibility of States for internationally wrongful acts*, art. 14, para. 3: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs").

[204] Convention against Torture, art. 2, para. 1.

[205] See Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, paragraph 4, in *Official Records of the General Assembly, Sixty-third Session, Supplement No. 44* (A/63/44), annex VI.

[206] Report of the Human Rights Council, *Official Records of the General Assembly, Seventieth Session, Supplement No. 53* (A/70/53), chap. II, resolution 28/34, adopted by the Human Rights Council on 27 March 2015.

[207] *Ibid.*, para. 2.

[208] *Ibid.*, para. 3.

the Secretary-General on the Prevention of Genocide, relevant United Nations bodies and with regional and subregional mechanisms".[209]

(16) In the regional context, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[210] contains no express obligation to "prevent" violations of the Convention, but the European Court of Human Rights has construed article 2, paragraph 1 (on the right to life), to contain such an obligation and to require that appropriate measures of prevention be taken, such as "putting in place an appropriate legal and administrative framework to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions".[211] At the same time, the Court has recognized that the State party's obligation in this regard is limited.[212] Likewise, although the 1969 American Convention on Human Rights[213] contains no express obligation to "prevent" violations of the Convention, the Inter-American Court of Human Rights, when construing the obligation of the States parties to "ensure" the free and full exercise of the rights recognized by the Convention,[214] has found that this obligation implies a "duty to prevent", which in turn requires the State party to pursue certain steps. The Court has said:

> This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party.[215]

---

[209] *Ibid.*, para. 4.

[210] Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), United Nations, *Treaty Series*, vol. 213, No. 2889, p. 221 (hereinafter "European Convention on Human Rights").

[211] *Makaratzis v. Greece*, Application No. 50385/99, Judgment of 20 December 2004, Grand Chamber, European Court of Human Rights, ECHR 2004-XI, para. 57; see *Kılıç v. Turkey*, Application No. 22492/93, Judgment of 28 March 2000, European Court of Human Rights, ECHR 2000-III, para. 62 (finding that article 2, paragraph 1, obliged a State Party not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps within its domestic legal system to safeguard the lives of those within its jurisdiction).

[212] *Mahmut Kaya v. Turkey*, Application No. 22535/93, Judgment of 28 March 2000, First Section, European Court of Human Rights, ECHR 2000-III, para. 86 ("Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the positive obligation [of article 2, paragraph 1,] must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities".); see also *Kerimova and others v. Russia*, Application Nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05, and 5684/05, Final Judgment of 15 September 2011, First Section, European Court of Human Rights, para. 246; *Osman v. the United Kingdom*, Judgment of 28 October 1998, Grand Chamber, European Court of Human Rights, *Reports* 1998-VIII, para. 116.

[213] American Convention on Human Rights: "Pact of San José, Costa Rica" (San Jose, 22 November 1969), Organization of American States, *Treaty Series*, vol. 1144, No. 17955, p. 123.

[214] Article 1, paragraph 1, reads: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination". It is noted that article 1 of the African Charter on Human and Peoples' Rights provides that the States parties "shall recognise the rights, duties and freedoms enshrined in [the] Charter and shall undertake to adopt legislative or other measures to give effect to them". African Charter on Human and Peoples' Rights ("Banjul Charter") (Nairobi, 27 June 1981), United Nations, *Treaty Series*, vol. 1520, No. 26363, p. 217.

[215] *Velásquez-Rodríguez v. Honduras*, Judgment of 29 July 1988 (Merits), Inter-American Court of Human Rights, Series C, No. 4, para. 175; see also *Gómez-Paquiyauri Brothers v. Peru*, Judgment of 8 July 2004 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 110, para. 155; *Juan Humberto Sánchez v. Honduras*, Judgment of 7 June 2003 (Preliminary Objection, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 99, paras. 137 and 142.

Similar reasoning has animated the Court's approach to interpretation of article 6 of the 1985 Inter-American Convention to Prevent and Punish Torture.[216]

(17) Thus, the specific preventive measures that any given State shall pursue with respect to crimes against humanity will depend on the context and risks at issue for that State with respect to these offenses. Such an obligation usually would oblige the State at least to: (a) adopt national laws and policies as necessary to establish awareness of the criminality of the act and to promote early detection of any risk of its commission; (b) continually to keep those laws and policies under review and as necessary improve them; (c) pursue initiatives that educate governmental officials as to the State's obligations under the draft articles; (d) implement training programmes for police, military, militia and other relevant personnel as necessary to help prevent the commission of crimes against humanity; and (e) once the proscribed act is committed, fulfil in good faith any other obligations to investigate and either prosecute or extradite offenders, since doing so serves, in part, to deter future acts by others.[217] Some measures, such as training programmes, may already exist in the State to help prevent wrongful acts (such as murder, torture or rape) that relate to crimes against humanity. The State is obligated to supplement those measures, as necessary, specifically to prevent crimes against humanity. Here, too, international responsibility of the State arises if the State has failed to use its best efforts to organize the governmental and administrative apparatus, as necessary and appropriate, in order to prevent as far as possible crimes against humanity.

(18) Subparagraph (a) of paragraph 1 of draft article 4, refers to a State pursuing effective legislative, administrative, judicial or other preventive measures "in any territory under its jurisdiction". Such a formulation covers the territory of a State, but also covers activities carried out in other territory under the State's jurisdiction. As the Commission has previously explained,

> it covers situations in which a State is exercising *de facto* jurisdiction, even though it lacks jurisdiction *de jure*, such as in cases of unlawful intervention, occupation and unlawful annexation. Reference may be made, in this respect, to the advisory opinion by [the International Court of Justice] in the *Namibia* case. In that advisory opinion, the Court, after holding South Africa responsible for having created and

---

[216] *Tibi v. Ecuador*, Judgment of 7 September 2004 (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 114, para. 159; see also *Gómez-Paquiyauri Brothers v. Peru*, (see footnote 215 above), para. 155.

[217] For comparable measures with respect to prevention of specific types of human rights violations, see Committee on the Elimination of Discrimination against Women, general recommendation No. 6 (1988) on effective national machinery and publicity, paras. 1-2, *Official Records of the General Assembly, Forty-third Session, Supplement No. 38* (A/43/38), chap. V, para. 770; Committee on the Elimination of Discrimination against Women, general recommendation No. 15 (1990) on the avoidance of discrimination against women in national strategies for the prevention and control of AIDS, *ibid., Forty-fifth Session, Supplement No. 38* (A/45/38), chap. IV, para. 438; Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1992) on violence against women, para. 9, *ibid., Forty-seventh Session, Supplement No. 38* (A/47/38), chap. I; Committee on the Rights of the Child, general comment No. 5 (2003) on general measures of implementation of the Convention, para. 9, *ibid., Fifty-ninth Session, Supplement No. 41* (A/59/41), annex XI; Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, in *ibid., Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III; Committee on the Rights of the Child, general comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, paras. 50-63, *ibid., Sixty-first Session, Supplement No. 41* (A/61/41), annex II; Committee on the Elimination of Racial Discrimination, general recommendation 31 (2005) on the prevention of racial discrimination in the administration and functioning of the criminal justice system, para. 5, *ibid., Sixtieth Session, Supplement No. 18* (A/60/18), chap. IX, para. 460; see also Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex, principle 3 (a) ("The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, *inter alia*, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations").

> maintained a situation which the Court declared illegal and finding South Africa under an obligation to withdraw its administration from Namibia, nevertheless attached certain legal consequences to the *de facto* control of South Africa over Namibia.[218]

(19) Fourth, by the undertaking set forth in paragraph 1 of draft article 4, States have an obligation to pursue certain forms of cooperation, not just with each other but also with organizations, such as the United Nations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies. The duty of States to cooperate in the prevention of crimes against humanity arises, in the first instance, from Article 1, paragraph 3, of the Charter of the United Nations,[219] which indicates that one of the purposes of the Charter is to "achieve international cooperation in solving international problems of ... [a] humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all". Further, in Articles 55 and 56 of the Charter, all Members of the United Nations pledge "to take joint and separate action in cooperation with the Organization for the achievement of" certain purposes, including "universal respect for, and observance of, human rights and fundamental freedoms for all". Specifically with respect to preventing crimes against humanity, the General Assembly of the United Nations recognized in its 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity a general responsibility for inter-State cooperation and intra-State action to prevent the commission of war crimes and crimes against humanity. Among other things, the Assembly declared that "States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose".[220]

(20) Consequently, subparagraph (b) of paragraph 1 of draft article 4 indicates that States shall cooperate with each other to prevent crimes against humanity and cooperate with relevant intergovernmental organizations. The term "relevant" is intended to indicate that cooperation with any particular intergovernmental organization will depend, among other things, on the organization's functions, on the relationship of the State to that organization, and on the context in which the need for cooperation arises. Further, subparagraph (b) provides that States shall cooperate, as appropriate, with other organizations. These organizations include non-governmental organizations that could play an important role in the prevention of crimes against humanity in specific countries. The term "as appropriate" is used to indicate that the obligation of cooperation, in addition to being contextual in nature, does not extend to these organizations to the same extent as it does to States and relevant intergovernmental organizations.

(21) Draft article 4, paragraph 2, indicates that no exceptional circumstances may be invoked as a justification for the offence. This text is inspired by article 2, paragraph 2, of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

---

[218] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paragraph 12 of the commentary to article 1 of the draft articles on the prevention of transboundary harm from hazardous activities, p. 151 (citing to *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 54, para. 118); see also *Yearbook … 2006*, vol. II (Part Two), p. 70, para. (25) of the commentary to principle 2 of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 242, para. 29 (referring to "the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control").

[219] Charter of the United Nations (San Francisco, 26 June 1945).

[220] Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, General Assembly resolution 3074 (XXVIII) of 3 December 1973, para. 3.

Punishment,[221] but has been refined to fit better in the context of crimes against humanity. The expression "state of war or threat of war" has been replaced by the expression "armed conflict," as was done in draft article 2. In addition, the words "such as" are used to stress that the examples given are not meant to be exhaustive.

(22) Comparable language may be found in other treaties addressing serious crimes at the global or regional level. For example, article 1, paragraph 2, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance contains similar language,[222] as does article 5 of the 1985 Inter-American Convention to Prevent and Punish Torture.[223]

(23) One advantage of this formulation with respect to crimes against humanity is that it is drafted in a manner that can speak to the conduct of either State or non-State actors. At the same time, the paragraph is addressing this issue only in the context of the obligation of prevention and not, for example, in the context of possible defences by an individual in a criminal proceeding or other grounds for excluding criminal responsibility.

Article 5
Non-refoulement

1. No State shall expel, return (*refouler*), surrender or extradite a person to territory under the jurisdiction of another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

Commentary

(1) Consistent with the broad objective of prevention addressed in draft article 4, draft article 5, paragraph 1, provides that no State shall send a person to territory under the jurisdiction of another State where there are substantial grounds for believing that such person would be in danger of being subjected to a crime against humanity. Thus, this provision uses the principle of *non-refoulement* to prevent persons in certain circumstances from being exposed to crimes against humanity.

(2) As a general matter, the principle of *non-refoulement* obligates a State not to return a person to another State where there are substantial grounds for believing that he or she will be in danger of persecution or some other specified harm. The principle was incorporated in various treaties during the twentieth century, including the 1949 Fourth Geneva Convention,[224] but is most commonly associated with international refugee law and, in particular, article 33 of the 1951 Convention relating to the Status of Refugees.[225] Other

---

[221] Convention against Torture, art. 2, para. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture").

[222] International Convention for the Protection of All Persons from Enforced Disappearance, art. 1, para. 2 ("No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance").

[223] Inter-American Convention to Prevent and Punish Torture, art. 5 ("The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture").

[224] Geneva Convention IV, art. 45.

[225] Convention relating to the Status of Refugees (Geneva, 28 July 1951), United Nations, *Treaty Series*, vol. 189, No. 2545, p. 137, art. 33, para. 1 ("No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

conventions and instruments[226] addressing refugees have also incorporated the principle, such as the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.[227]

(3) The principle also has been applied with respect to all aliens (not just refugees) in various instruments[228] and treaties, such as the 1969 American Convention on Human Rights[229] and the 1981 African Charter on Human and Peoples' Rights.[230] Indeed, the principle was addressed in this broader sense in the Commission's 2014 draft articles on the expulsion of aliens.[231] The Human Rights Committee and the European Court of Human Rights have construed the prohibition against torture or cruel, inhuman or degrading treatment, contained in article 7 of the 1966 International Covenant on Civil and Political Rights[232] and article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms[233] respectively, as implicitly imposing an obligation of *non-refoulement* even though these conventions contain no such express obligation. Further, the principle of *non-refoulement* is often reflected in extradition treaties, by stating that nothing in the treaty shall be interpreted as imposing an obligation to extradite an alleged offender if the requested State party has substantial grounds for believing the request has been made to persecute the alleged offender on specified grounds. Draft article 13, paragraph 9, of the present draft articles is a provision of this type.

(4) Of particular relevance for the present draft articles, the principle has been incorporated in treaties addressing particular crimes, such as torture and enforced disappearance. For example, article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides:

> 1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including,

---

threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

[226] See, for example, Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena, Colombia, 22 November 1984, conclusion 5.

[227] Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (Addis Ababa, 10 September 1969), United Nations, *Treaty Series*, vol. 1001, No. 14691, p. 45, art. II, para. 3.

[228] See, for example, Declaration on Territorial Asylum, General Assembly resolution 2312 (XXII) of 14 December 1967 (A/6716); Final Text of the 1966 Bangkok Principles on the Status and Treatment of Refugees, adopted by the Asian-African Legal Consultative Organization at its fortieth session, held in New Delhi on 24 June 2001, art. III; Council of Europe, recommendation No. R(84)1 of the Committee of Ministers to member States on the protection of persons satisfying the criteria in the Geneva Convention who are not formally recognised as refugees, adopted by the Committee of Ministers on 25 January 1984.

[229] American Convention on Human Rights, art. 22, para. 8.

[230] African Charter on Human and Peoples' Rights ("Banjul Charter"), art. 12, para. 3.

[231] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/69/10), para. 44, art. 23, para. 1 ("No alien shall be expelled to a State where his or her life would be threatened on grounds such as race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, birth or other status, or any other ground impermissible under international law").

[232] See Human Rights Committee, general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, para. 9, *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement").

[233] See, for example, *Chahal v. United Kingdom*, Application No. 22414/93, Judgment of 15 November 1996, Grand Chamber, European Court of Human Rights, ECHR 1996-V, para. 80.

> where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

(5) This provision was modelled on the 1951 Convention relating to the Status of Refugees, but added the additional element of "extradition" to cover another possible means by which a person is physically transferred to another State.[234] Similarly, article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides that:

> 1. No State Party shall expel, return ("*refouler*"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

(6) The Commission deemed it appropriate to model draft article 5 after this latter provision. While, as in earlier conventions, the State's obligation under draft article 5, paragraph 1, is focused on avoiding exposure of a person to crimes against humanity, this provision is without prejudice to other obligations of *non-refoulement* upon the State arising from treaties or customary international law.

(7) Draft article 5, paragraph 1, provides that the State shall not send the person to another State "where there are substantial grounds for believing that he or she would be in danger" of being subjected to a crime against humanity. This standard has been addressed by various expert treaty bodies and by international courts. For example, the Committee against Torture, in considering communications alleging that a State has violated article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, has stated that "substantial grounds" exist whenever the risk of torture is personal, present, foreseeable and real.[235] In determining whether such a risk exists, the risk of torture must be assessed on grounds that "go beyond mere theory or suspicion", although "the risk does not have to meet the test of being highly probable".[236]

(8) In guidance to States, the Human Rights Committee has indicated that a State has an obligation "not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed".[237] In interpreting this standard, the Human Rights Committee has concluded that

---

[234] A similar provision is included in the Charter of Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1, art. 19, para. 2 ("No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment").

[235] See, for example, Committee against Torture, *Dadar v. Canada*, communication No. 258/2004, Views adopted on 23 November 2005, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A, p. 241, para. 8.4; *N.S. v. Switzerland*, communication No. 356/2008, Views adopted on 6 May 2010, *ibid., Sixty-fifth Session, Supplement No. 44* (A/65/44), annex XIII, sect. A, p. 335, para. 7.3.

[236] See also Committee against Torture, general comment No. 1 (1997) on the implementation of article 3, paras. 6-7, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex IX, p. 52. At its fifty-fifth and fifty-eighth sessions, in 2015 and 2016 respectively, the Committee against Torture agreed to revise general comment No. 1. The draft revised text of 2 February 2017 (CAT/C/60/R.2) is available from http://www.ohchr.org/Documents/HRBodies/CAT/GC/Article3/CAT-C-GC-1.pdf. See also, for example, Committee against Torture, *A.R. v. Netherlands*, communication No. 203/2002, Views adopted on 14 November 2003, *ibid., Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A, para. 7.3.

[237] Human Rights Committee, general comment No. 31, para. 12, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40), vol. I, annex III.

States must refrain from exposing individuals to a real risk of violations of their rights under the Covenant, as a "necessary and foreseeable consequence" of expulsion.[238] It has further maintained that the existence of such a real risk must be decided "in the light of the information that was known, or ought to have been known" to the State party's authorities at the time and does not require "proof of actual torture having subsequently occurred although information as to subsequent events is relevant to the assessment of initial risk".[239]

(9) The European Court of Human Rights has found that a State's obligation is engaged where there are substantial grounds for believing that an individual would face a real risk of being subjected to treatment contrary to article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[240] In applying this legal test, States must examine the "foreseeable consequences" of sending an individual to the receiving country.[241] While a "mere possibility" of ill-treatment is not sufficient, it is not necessary to show that subjection to ill-treatment is "more likely than not".[242] The European Court of Human Rights has stressed that the examination of evidence of a real risk must be "rigorous".[243] Further, and similarly to the Human Rights Committee, the evidence of the risk "must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the expulsion",[244] though regard can be had to information that comes to light subsequently.[245]

(10) Draft article 5, paragraph 2, provides that States shall take into account "all relevant considerations" when determining whether there are substantial grounds for the purposes of paragraph 1. Such considerations include, but are not limited to, "the existence in the territory under the jurisdiction of the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law". Indeed, various considerations may be relevant. When interpreting the 1966 International Covenant on Civil and Political Rights, the Human Rights Committee has stated that all relevant factors should be considered, and that "[t]he existence of assurances, their content and the existence and implementation of enforcement mechanisms are all elements which are relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment existed".[246] The Committee against Torture has developed, for the purposes of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a non-exhaustive list of seven elements that need to be assessed in each individual case by a State party when determining if return is permissible.[247]

---

[238] See, for example, Human Rights Committee, *Chitat Ng v. Canada*, communication No. 469/1991, Views adopted on 5 November 1993, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 40* (A/49/40), vol. II, annex IX, sect. CC, para. 15.1 (a); *A.R.J. v. Australia*, communication No. 692/1996, Views adopted on 28 July 1997, *ibid., Fifty-second Session, Supplement No. 40* (A/52/40), vol. II, annex VI, sect. T, para. 6.14; *Hamida v. Canada*, communication No. 1544/2007, Views adopted on 18 March 2010, *ibid., Sixty-fifth Session, Supplement No. 40* (A/65/40), vol. II, annex V, sect. V, para. 8.7.

[239] See, for example, Human Rights Committee, *Maksudov and others v. Kyrgyzstan*, communication Nos. 1461/2006, 1462/2006, 1476/2006 and 1477/2006, Views adopted on 16 July 2008, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), vol. II, annex V, sect. W, para. 12.4.

[240] See, for example, *Soering v. United Kingdom*, Application No. 14038/88, Judgment of 7 July 1989, European Court of Human Rights, Series A, vol. 161, para. 88; *Chahal v. United Kingdom* (see footnote 233 above), para. 74.

[241] See, for example, *Saadi v. Italy*, Application No. 37201/06, Judgment of 28 February 2008, Grand Chamber, European Court of Human Rights, ECHR 2008-II, para. 130.

[242] *Ibid.*, paras. 131 and 140.

[243] *Ibid.*, para. 128.

[244] *Ibid.*, para. 133.

[245] See, for example, *El-Masri v. the former Yugoslav Republic of Macedonia*, Application No. 39630/09, Judgment of 13 December 2012, Grand Chamber, European Court of Human Rights, ECHR 2012-VI, para. 214.

[246] See, for example, *Maksudov v. Kyrgyzstan* (see footnote 239 above), para. 12.4.

[247] Committee against Torture, general comment No. 1, para. 8. The list contains the following elements: (a) whether the State concerned is one for which there is evidence of a consistent pattern of gross,

(11) The 1951 Convention relating to the Status of Refugees contains exceptions to the *non-refoulement* obligation to allow return where the person has committed a crime or presented a serious security risk.[248] Treaties since that time, however, have not included such exceptions, treating the obligation as absolute in nature.[249] The Commission deemed it appropriate for draft article 5 to contain no such exception.

Article 6
Criminalization under national law

1. Each State shall take the necessary measures to ensure that crimes against humanity constitute offences under its criminal law.

2. Each State shall take the necessary measures to ensure that the following acts are offences under its criminal law:

(a) committing a crime against humanity;

(b) attempting to commit such a crime; and

(c) ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

3. Each State shall also take the necessary measures to ensure that the following are offences under its criminal law:

(a) a military commander or person effectively acting as a military commander shall be criminally responsible for crimes against humanity committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) that military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in subparagraph (a), a superior shall be criminally responsible for crimes against humanity committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

---

flagrant or mass violations of human rights; (b) whether the individual has been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity in the past; (c) whether there is medical or other independent evidence to support a claim that the individual has been tortured or maltreated in the past; (d) whether the internal situation with respect to human rights in the State concerned has changed; (e) whether the individual has engaged in political or other activity within or outside the State concerned which would make him particularly vulnerable to the risk of being placed in danger of torture; (f) whether there is any evidence as to the credibility of the individual; and (g) whether there are any factual inconsistencies in the individual's claim.

[248] Convention relating to the Status of Refugees, art. 33, para. 2.

[249] See, for example, *Maksudov v. Kyrgyzstan* (see footnote 239 above), para. 12.4; *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, Judgment of 17 January 2012, Fourth Section, European Court of Human Rights, ECHR 2012-I, para. 185; Committee against Torture, *Tapia Paez v. Sweden*, communication No. 39/1996, Views adopted on 28 April 1997, *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44* (A/52/44), annex V, sect. B.4, para. 14.5; *Abdussamatov et al. v. Kazakhstan*, communication No. 444/2010, Views adopted on 1 June 2012, *ibid., Sixty-seventh Session, Supplement No. 44* (A/67/44), annex XIV, sect. A, p. 530, para. 13.7.

(i) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) the crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

4. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding criminal responsibility of a subordinate.

5. Each State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility.

6. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall not be subject to any statute of limitations.

7. Each State shall take the necessary measures to ensure that, under its criminal law, the offences referred to in this draft article shall be punishable by appropriate penalties that take into account their grave nature.

8. Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Commentary

(1) Draft article 6 sets forth various measures that each State must take under its criminal law to ensure that crimes against humanity constitute offences, to preclude certain defences or any statute of limitation, and to provide for appropriate penalties commensurate with the grave nature of such crimes. Measures of this kind are essential for the proper functioning of the subsequent draft articles relating to the establishment and exercise of jurisdiction over alleged offenders.

Ensuring that "crimes against humanity" are offences in national criminal law

(2) The International Military Tribunal at Nürnberg recognized the importance of punishing individuals, *inter alia*, for crimes against humanity when it stated that: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[250] The Commission's 1950 Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided that: "Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment".[251] The 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity provided in its preamble that "the effective punishment of … crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples and the promotion of international peace and security". The preamble to the 1998 Rome Statute affirms "that the most serious crimes of concern to the international community as a

---

[250] *Judgment of 30 September 1946* (see footnote 29 above), p. 466.

[251] *Yearbook … 1950*, vol. II, document A/1316, Part III, p. 374, para. 97 (principle 1).

whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation".

(3) Many States have adopted laws on crimes against humanity that provide for the prosecution of such crimes in their national system. The 1998 Rome Statute, in particular, has inspired the enactment or revision of a number of national laws on crimes against humanity that define such crimes in terms identical to or very similar to the offence as defined in article 7 of that Statute. At the same time, many States have adopted national laws that differ, sometimes significantly, from the definition set forth in article 7. Moreover, still other States have not adopted any national law on crimes against humanity. Those States typically do have national criminal laws that provide for punishment in some fashion of many of the individual acts that, under certain circumstances, may constitute crimes against humanity, such as murder, torture or rape.[252] Yet those States have not criminalized crimes against humanity as such and this lacuna may preclude prosecution and punishment of the conduct, including in terms commensurate with the gravity of the offence.

(4) The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides in article 4, paragraph 1, that: "Each State Party shall ensure that all acts of torture are offences under its criminal law".[253] The Committee against Torture has stressed the importance of fulfilling such an obligation so as to avoid possible discrepancies between the crime as defined in the Convention and the crime as it is addressed in national law:

> Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State.[254]

(5) To help avoid such loopholes with respect to crimes against humanity, draft article 6, paragraph 1, provides that each State shall take the necessary measures to ensure that crimes against humanity, as such, constitute offences under its criminal law. Draft article 6, paragraphs 2 and 3 (discussed below), then further obligate the State to criminalize certain ways by which natural persons might engage in such crimes.

(6) Since the term "crimes against humanity" is defined in draft article 3, paragraphs 1 to 3, the obligation set forth in draft article 6, paragraph 1, requires that the crimes so defined are made offences under the State's national criminal laws. While there might be some deviations from the exact language of draft article 3, paragraphs 1 to 3, so as to take account of terminological or other issues specific to any given State, such deviations should not result in qualifications or alterations that significantly depart from the meaning of crimes against humanity as defined in draft article 3, paragraphs 1 to 3. The term "crimes against humanity" used in draft article 6 (and in subsequent draft articles), however, does not include the "without prejudice" clause contained in draft article 3, paragraph 4. While that clause recognizes the possibility of a broader definition of "crimes against humanity"

---

[252] See *Prosecutor v. Gbagbo*, Case No. ICC-02/11-01/12 OA, Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo", 27 May 2015, Appeals Chamber, International Criminal Court (finding that a national prosecution for the ordinary domestic crimes of disturbing the peace, organizing armed gangs and undermining State security was not based on substantially the same conduct at issue for alleged crimes against humanity of murder, rape, other inhumane acts and persecution).

[253] Convention against Torture, art. 4, para. 1.

[254] See Committee against Torture, general comment No. 2 (2007); see also Committee against Torture, *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 44* (A/58/44), chap. III, consideration of reports submitted by States parties under article 19 of the Convention, Slovenia, para. 115 (a), and Belgium, para. 130.

in any international instrument or national law, for the purposes of these draft articles the definition of "crimes against humanity" is limited to draft article 3, paragraphs 1 to 3.

(7) Like the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many treaties in the areas of international humanitarian law, human rights and international criminal law require that a State party ensure that the prohibited conduct is an "offence" or "punishable" under its national law, though the exact wording of the obligation varies.[255] Some treaties, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide[256] and the 1949 Geneva Conventions,[257] contain an obligation to enact "legislation", but the Commission viewed it appropriate to model draft article 6, paragraph 1, on more recent treaties, such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Committing, attempting to commit, assisting in or contributing to a crime against humanity

(8) Draft article 6, paragraph 2, provides that each State shall take the necessary measures to ensure that certain ways by which natural persons might engage in crimes against humanity are criminalized under national law, specifically: committing a crime against humanity; attempting to commit such a crime; and ordering, soliciting, inducing, aiding, abetting or otherwise assisting in or contributing to the commission or attempted commission of such a crime.

(9) In the context of crimes against humanity, a survey of both international instruments and national laws suggests that various types (or modes) of individual criminal responsibility are addressed. First, all jurisdictions that have criminalized "crimes against humanity" impose criminal responsibility upon a person who "commits" the offence (sometimes referred to in national law as "direct" commission, as "perpetration" of the act or as being a "principal" in the commission of the act). For example, the Nürnberg Charter, in article 6, provided jurisdiction for the International Military Tribunal over "persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes". Likewise, the Statutes of both the International Criminal Tribunal for the Former Yugoslavia[258] and the International Criminal Tribunal for Rwanda[259] provided that a person who "committed" crimes against humanity "shall be individually responsible for the crime". The 1998 Rome Statute provides that: "A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment" and "a person shall be criminally

---

[255] See, for example: Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970), United Nations, *Treaty Series*, vol. 860, No. 12325, p. 105, art. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2; International Convention against the Taking of Hostages, art. 2; Convention against Torture, art. 4; Inter-American Convention to Prevent and Punish Torture, art. 6; Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; Inter-American Convention on Forced Disappearance of Persons, art. III; International Convention for the Suppression of Terrorist Bombings, art. 4; International Convention for the Suppression of the Financing of Terrorism (New York, 9 December 1999), United Nations, *Treaty* Series, vol. 2178, No. 38349, p. 197, art. 4; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), *ibid.*, vol. 2219, No. 39464, p. 179, art. 2 (a); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 5, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Association of Southeast Asian Nations Convention on Counter Terrorism (Cebu, 13 January 2007), art. IX, para. 1, in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 336.

[256] Genocide Convention, art. V.

[257] Geneva Convention I; Geneva Convention II; Geneva Convention III; Geneva Convention IV. For the Commentary of 2016 on art. 49 (Penal sanctions) of Geneva Convention I (hereinafter "2016 ICRC Commentary on art. 49"), see International Committee of the Red Cross (ICRC).

[258] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1.

[259] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) [c]ommits such a crime, whether as an individual [or] jointly with another".[260] Similarly, the instruments regulating the Special Court for Sierra Leone,[261] the Special Panels for Serious Crimes in East Timor,[262] the Extraordinary Chambers in the Courts of Cambodia,[263] the Supreme Iraqi Criminal Tribunal[264] and the Extraordinary African Chambers within the Senegalese Judicial System[265] all provide for the criminal responsibility of a person who "commits" crimes against humanity. National laws that address crimes against humanity invariably criminalize the "commission" of such crimes. Treaties addressing other types of crimes also inevitably call upon States parties to adopt national laws proscribing "commission" of the offence. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides for individual criminal responsibility for the "commission" of genocide.[266]

(10) Second, all such national or international jurisdictions, to one degree or another, also impose criminal responsibility upon a person who participates in the offence in some way other than "commission" of the offence. Such conduct may take the form of an "attempt" to commit the offence, or acting as an "accessory" or "accomplice" to the offence or an attempted offence. With respect to an "attempt" to commit the crime, the Statutes of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the Special Court for Sierra Leone contained no provision for such responsibility. In contrast, the 1998 Rome Statute provides for the criminal responsibility of a person who attempts to commit the crime, unless he or she abandons the effort or otherwise prevents completion of the crime.[267] In the *Banda and Jerbo* case, a pre-trial chamber asserted that criminal responsibility for attempt "requires that, in the ordinary course of events, the perpetrator's conduct [would] have resulted in the crime being completed, had circumstances outside the perpetrator's control not intervened".[268]

(11) Third, with respect to "accessorial" responsibility, such a concept is addressed in international instruments through various terms, such as "ordering", "soliciting", "inducing", "instigating", "inciting", "aiding and abetting", "conspiracy to commit", "being an accomplice to", "participating in" or "joint criminal enterprise". Thus, the Statute of the International Criminal Tribunal for the Former Yugoslavia provides: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime".[269] The Statute of the International Criminal

---

[260] See Rome Statute, art. 25, paras. 2 and 3 (a).

[261] Statute of the Special Court for Sierra Leone, art. 6.

[262] United Nations Transitional Administration in East Timor, Regulation No. 2000/15 on the establishment of panels with exclusive jurisdiction over serious criminal offences (UNTAET/REG/2000/15), sect. 5 (2000) (hereinafter "East Timor Tribunal Charter").

[263] Extraordinary Chambers of Cambodia Agreement, art. 5. See also Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (Phnom Penh, 6 June 2003), United Nations, *Treaty Series*, vol. 2329, No. 41723, p. 117.

[264] Statute of the Iraqi Special Tribunal, ILM, vol. 43, p. 231, art. 10 (b) (2004) (hereinafter, "Supreme Iraqi Criminal Tribunal Statute"). The Iraqi Interim Government enacted a new statute in 2005, built upon the earlier statute, which changed the tribunal's name to "Supreme Iraqi Criminal Tribunal". See Law of the Supreme Iraqi Criminal Tribunal, Law No. 10, *Official Gazette of the Republic of Iraq*, vol. 47, No. 4006 (18 October 2005).

[265] Statute of the Extraordinary African Chambers within the Courts of Senegal Created to Prosecute International Crimes Committed in Chad between 7 June 1982 and 1 December 1990, *International Law Materials*, vol. 52, p. 1028, arts. 4 (b) and 6 (2013) (hereinafter "Extraordinary African Chambers Statute").

[266] Genocide Convention, arts. III (a) and IV.

[267] Rome Statute, art. 25, para. 3 (f).

[268] *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Case No. ICC-02/05-03/09, Corrigendum of the Decision on the confirmation of charges, 7 March 2011, Pre-Trial Chamber I, International Criminal Court, para. 96.

[269] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 1. Various decisions of the Tribunal have analysed such criminal responsibility. See, for example, *Tadić*,

Tribunal for Rwanda used virtually identical language.[270] Both tribunals have convicted defendants for participation in such offences within their respective jurisdictions.[271] Similarly, the instruments regulating the Special Court for Sierra Leone,[272] the Special Panels for Serious Crimes in East Timor,[273] the Extraordinary Chambers in the Courts of Cambodia,[274] the Supreme Iraqi Criminal Tribunal[275] and the Extraordinary African Chambers within the Senegalese Judicial System[276] all provided for the criminal responsibility of a person who, in one form or another, participates in the commission of crimes against humanity.

(12) The 1998 Rome Statute provides for criminal responsibility if the person commits "such a crime … through another person", if the person "[o]rders, solicits or induces the commission of the crime which in fact occurs or is attempted", if the person for "the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission" or if the person in "any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with common purpose", subject to certain conditions.[277] The Commission decided to use the various terms set forth in the 1998 Rome Statute as the basis for the terms used in draft article 6, paragraph 2.

(13) In these various international instruments, the related concepts of "soliciting", "inducing" and "aiding and abetting" the crime are generally regarded as including planning, instigating, conspiring and, importantly, directly inciting another person to engage in the action that constitutes the offence. Indeed, the Convention on the Prevention and Punishment of the Crime of Genocide addresses not just the commission of genocide, but also "[c]onspiracy to commit genocide", "[d]irect and public incitement to commit genocide", an "[a]ttempt to commit genocide" and "[c]omplicity in genocide".[278] The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity broadly provides that: "If any of the crimes mentioned in article I is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission".[279]

(14) Further, the concept in these various instruments of "ordering" the crime differs from (and complements) the concept of "command" or other superior responsibility. Here, "ordering" concerns the criminal responsibility of the superior for affirmatively instructing that action be committed that constitutes an offence. In contrast, command or other superior responsibility concerns the criminal responsibility of the superior for a failure to act; specifically, in situations where the superior knew or had reason to know that subordinates were about to commit such acts or had done so, and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators.

Judgment, 15 July 1999 (see footnote 46 above) (finding that "the notion of common design as a form of accomplice liability is firmly established in customary international law").

[270] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 1.

[271] See, for example, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, 10 December 1998, Trial Chamber II, International Criminal Tribunal for the Former Yugoslavia, *Judicial Reports 1998*, para. 246 (finding that: "If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor").

[272] Statute of the Special Court for Sierra Leone, art. 6, para. 1.

[273] East Timor Tribunal Charter, sect. 14.

[274] Extraordinary Chambers of Cambodia Agreement, art. 29.

[275] Supreme Iraqi Criminal Tribunal Statute, art. 15.

[276] Extraordinary African Chambers Statute, art. 10.

[277] Rome Statute, art. 25, para. 3 (a)-(d).

[278] Genocide Convention, art. III (b)-(e).

[279] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. 2.

(15) Treaties addressing crimes other than crimes against humanity typically provide for criminal responsibility of persons who participate in the commission of the offence, using broad terminology that does not seek to require States to alter the preferred terminology or modalities that are well settled in national law. In other words, such treaties use general terms rather than detailed language, allowing States to spell out the precise details of the criminal responsibility through existing national statutes, jurisprudence and legal tradition. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance broadly provides: "Each State Party shall take the necessary measures to hold criminally responsible at least … [a]ny person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance".[280] The language of draft article 6, paragraph 2, takes the same approach.

Command or other superior responsibility

(16) Draft article 6, paragraph 3, addresses the issue of command or other superior responsibility. In general, this paragraph provides that superiors are criminally responsible for crimes against humanity committed by subordinates, in circumstances where the superior has engaged in a dereliction of duty with respect to the subordinates' conduct.

(17) International jurisdictions that have addressed crimes against humanity impute criminal responsibility to a military commander or other superior for an offence committed by subordinates in certain circumstances.[281] Notably, the Nürnberg and Tokyo tribunals used command responsibility with respect to both military and civilian commanders, an approach that influenced later tribunals.[282] As indicated by a trial chamber of the International Criminal Tribunal for Rwanda in *Prosecutor v. Alfred Musema*: "As to whether the form of individual criminal responsibility referred to under Article 6(3) of the [International Criminal Tribunal for Rwanda] Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle".[283]

(18) The Statute of the International Criminal Tribunal for the Former Yugoslavia provides that: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".[284] Several defendants were convicted by the International Criminal Tribunal for the Former Yugoslavia on such a basis.[285] The same language appears in the Statute of the International Criminal Tribunal for Rwanda,[286] which also convicted several defendants on such a basis.[287] Similar language

---

[280] International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1 (a).

[281] See, for example, *United States of America v. Wilhelm von Leeb, et al.* ("The High Command Case"), in *Trials of War Criminals Before the Nuernberg Military Tribunals*, vol. 11 (Washington D.C., United States Government Printing Office, 1950), pp. 543-544.

[282] *Ibid.*; see also *International Criminal Law: International Enforcement*, M.C. Bassiouni, ed., vol. III, 3rd ed. (Leiden, Martinus Nijhoff, 2008, p. 461); and K.J. Heller, *The Nurenberg Military Tribunals and the Origins of International Criminal Law* (Oxford, Oxford University Press, 2011), pp. 262-263.

[283] See *Prosecutor v. Alfred Musema*, Case No. ICTR-96-13-A, Judgment and sentence, 27 January 2000, Trial Chamber I, International Criminal Tribunal for Rwanda, para. 132.

[284] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 3.

[285] See, for example, *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgment, 25 June 1999, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, *Judicial Supplement No. 6*, June/July 1999 paras. 66-77; *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Judgment, 16 November 1998, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, paras. 330-400 and 605-810.

[286] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 3.

[287] See *Akayesu*, Judgment, 2 September 1998 (see footnote 53 above); *Prosecutor v. Jean Kambanda*, Case No. ICTR-97-23-S, Judgment and sentence, 4 September 1998, Trial Chamber, International Criminal Tribunal for Rwanda.

appears in the instruments regulating the Special Court for Sierra Leone,[288] the Special Tribunal for Lebanon,[289] the Special Panels for Serious Crimes in East Timor,[290] the Extraordinary Chambers in the Courts of Cambodia,[291] the Supreme Iraqi Criminal Tribunal[292] and the Extraordinary African Chambers within the Senegalese Judicial System.[293]

(19) Article 28 of the 1998 Rome Statute contains a detailed standard by which criminal responsibility applies to a military commander or person effectively acting as a military commander with regard to the acts of others.[294] As a general matter, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the commander knew or should have known that his or her subordinates were committing or about to commit the offence; and (c) the commander failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter for investigation and prosecution. This standard has begun influencing the development of "command responsibility" in national legal systems, both in the criminal and civil contexts. Article 28 also addresses the issue of other "superior and subordinate relationships" arising in a non-military or civilian context. Such superiors include civilians that "lead" but are not "embedded" in military activities. Here, criminal responsibility arises when: (a) there is a relationship of subordination; (b) the civilian superior knew or consciously disregarded information regarding the offences; (c) the offences concerned activities that were within the effective responsibility and control of the superior; and (d) the superior failed to take all necessary and reasonable measures within his or her power to prevent or repress commission of all the offences or to submit the matter for investigation and prosecution.

(20) A trial chamber of the International Criminal Court applied this standard when convicting Jean-Pierre Bemba Gombo in March 2016 of crimes against humanity. Among other things, the trial chamber found that Mr. Bemba was a person effectively acting as a military commander who knew that the Mouvement de Libération du Congo forces under his effective authority and control were committing or about to commit the crimes charged. Additionally, the trial chamber found that Mr. Bemba failed to take all necessary and reasonable measures to prevent or repress the commission of crimes by his subordinates during military operations in 2002 and 2003 in the Central African Republic or to submit the matter to the competent authorities after crimes were committed.[295]

(21) National laws also often contain this type of criminal responsibility for war crimes, genocide and crimes against humanity, but differing standards are used. Moreover, some States have not developed such a standard in the context of crimes against humanity. For these reasons, the Commission viewed it appropriate to elaborate a clear standard so as to encourage harmonization of national laws on this issue.[296] To that end, draft article 6, paragraph 3, is modelled on the standard set forth in the 1998 Rome Statute.

---

[288] Statute of the Special Court for Sierra Leone, art. 6, para. 3.

[289] Statute of the Special Tribunal for Lebanon, Security Council resolution 1757 (2007) of 30 May 2007 (annex and attachment included), art. 3, para. 2.

[290] East Timor Tribunal Charter, sect. 16.

[291] Extraordinary Chambers of Cambodia Agreement, art. 29.

[292] Supreme Iraqi Criminal Tribunal Statute, art. 15.

[293] Extraordinary African Chambers Statute, art. 10.

[294] Rome Statute, art. 28; see, for example, *Kordić*, Judgment, 26 February 2001 (see footnote 46 above), para. 369.

[295] *Bemba*, Judgment, 21 March 2016 (see footnote 58 above), paras. 630, 638 and 734.

[296] See Commission on Human Rights report on the sixty-first session, *Official Records of the Economic and Social Council, 2005, Supplement No. 3* (E/2005/23-E/CN.4/2005/135), resolution 2005/81 on impunity of 21 April 2005, para. 6 (urging "all States to ensure that all military commanders and other superiors are aware of the circumstances in which they may be criminally responsible under international law for … crimes against humanity … including, under certain circumstances, for these crimes when committed by subordinates under their effective authority and control").

(22) Treaties addressing offences other than crimes against humanity also often acknowledge an offence in the form of command or other superior responsibility.[297]

Superior orders

(23) Draft article 6, paragraph 4, provides that each State shall take the necessary measures to ensure that the fact that an offence referred to in the article was committed pursuant to an order of a Government or of a superior, whether military or civilian, is not a ground for excluding the criminal responsibility of a subordinate.

(24) All jurisdictions that address crimes against humanity provide grounds for excluding substantive criminal responsibility to one degree or another. For example, most jurisdictions preclude criminal responsibility if the alleged perpetrator suffered from a mental disease that prevented the person from appreciating the unlawfulness of his or her conduct. Some jurisdictions provide that a state of intoxication also precludes criminal responsibility, at least in some circumstances. The fact that the person acted in self-defence may also preclude responsibility, as may duress resulting from a threat of imminent harm or death. In some instances, the person must have achieved a certain age to be criminally responsible. The exact grounds vary by jurisdiction and, with respect to national systems, are usually embedded in that jurisdiction's approach to criminal responsibility generally, not just in the context of crimes against humanity.

(25) At the same time, most jurisdictions that address crimes against humanity provide that perpetrators of such crimes cannot invoke as a defence to criminal responsibility that they were ordered by a superior to commit the offence.[298] Article 8 of the Nürnberg Charter provides: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires". Consistent with article 8, the International Military Tribunal found that the fact that "a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality".[299] Likewise, article 6 of the Charter of the Tokyo Tribunal provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[300]

(26) While article 33 of the 1998 Rome Statute allows for a limited superior orders defence, it does so exclusively with respect to war crimes; orders to commit acts of genocide or crimes against humanity do not fall within the scope of the defence. The instruments regulating the International Criminal Tribunal for the Former Yugoslavia,[301] the International Criminal Tribunal for Rwanda,[302] the Special Court for Sierra Leone,[303] the Special Tribunal for Lebanon,[304] the Special Panels for Serious Crimes in East Timor,[305] the Extraordinary Chambers in the Courts of Cambodia,[306] the Supreme Iraqi Criminal Tribunal[307] and the Extraordinary African Chambers within the Senegalese Judicial

---

[297] See, for example, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86, para. 2; International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 1.

[298] See Commission on Human Rights, resolution 2005/81 on impunity, para. 6 (urging all States "to ensure that all relevant personnel are informed of the limitations that international law places on the defence of superior orders").

[299] *Judgment of 30 September* (see footnote 29 above), p. 466.

[300] Tokyo Charter, art. 6.

[301] Statute of the International Criminal Tribunal for the former Yugoslavia, art. 7, para. 4.

[302] Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4.

[303] Statute of the Special Court for Sierra Leone, art. 6, para. 4.

[304] Statute of the Special Tribunal for Lebanon, art. 3, para. 3.

[305] East Timor Tribunal Charter, sect. 21.

[306] Extraordinary Chambers of Cambodia Agreement, art. 29.

[307] Supreme Iraqi Criminal Tribunal Statute, art. 15.

System[308] all similarly exclude superior orders as a defence. While superior orders are not permitted as a defence to prosecution for an offence, some of the international and national jurisdictions mentioned above allow orders from a superior to serve as a mitigating factor at the sentencing stage.[309]

(27) Such exclusion of superior orders as a defence exists in a range of treaties addressing crimes, such as: the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;[310] the 1985 Inter-American Convention to Prevent and Punish Torture;[311] the 1994 Inter-American Convention on Forced Disappearance of Persons;[312] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[313] In the context of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee against Torture has criticized national legislation that permits such a defence or is ambiguous on the issue.[314] In some instances, the problem arises from the presence in a State's national law of what is referred to as a "due obedience" defence.[315]

Official position

(28) Draft article 6, paragraph 5, provides that the fact that the offence was committed "by a person holding an official position" does not exclude substantive criminal responsibility. The inability to assert the existence of an official position as a substantive defence to criminal responsibility before international criminal tribunals is a well-established principle of international law. The Nürnberg Charter provided: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment".[316] The Commission's 1950 Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal provided: "The fact that a person who committed an act which constitutes a crime under international law [i.e., crimes against humanity, crimes against peace, and war crimes] acted as Head of State or responsible Government official does not relieve him from responsibility under

---

[308] Extraordinary African Chambers Statute, art. 10, para. 5.

[309] See, for example, Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7, para. 4; Statute of the International Criminal Tribunal for Rwanda, art. 6, para. 4; Statute of the Special Court for Sierra Leone, art. 6, para. 4; East Timor Tribunal Charter, sect. 21.

[310] Convention against Torture, art. 2, para. 3 ("An order from a superior officer or a public authority may not be invoked as a justification of torture").

[311] Inter-American Convention to Prevent and Punish Torture, art. 4 ("The fact of having acted under orders of a superior shall not provide exemption from the corresponding criminal liability").

[312] Inter-American Convention on Forced Disappearance of Persons, art. VIII ("The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them").

[313] International Convention for the Protection of All Persons from Enforced Disappearance, art. 6, para. 2 ("No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance"). This provision "received broad approval" at the drafting stage. See Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 72 (see also the Declaration on the Protection of All Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, art. 6).

[314] Report of the Committee against Torture, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 44* (A/61/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Guatemala, para. 32 (13).

[315] See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 44* (A/59/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Chile, para. 56 (i); see also, *ibid., Sixtieth Session, Supplement No. 44* (A/60/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Argentina, para. 31 (a) (praising Argentina for declaring its due obedience act "absolutely null and void").

[316] Nürnberg Charter, art. 7.

international law".[317] The Tokyo Charter provided: "Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires".[318]

(29) The Commission's 1954 draft Code of Offences against the Peace and Security of Mankind provided: "The fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code".[319] The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind provided: "The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment".[320] The 1998 Rome Statute provides: "This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".[321]

(30) The inability to use official position as a substantive defence to criminal responsibility is also addressed in some treaties relating to national criminal jurisdiction. For example, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, provides that individuals "shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".[322] The 1973 Convention on the Suppression and Punishment of the Crime of Apartheid provides that "[i]nternational criminal responsibility shall apply … to … representatives of the State, whether residing in the territory of the State in which the acts are perpetrated or in some other State".[323]

(31) In the light of such precedents, the Commission deemed it appropriate to include paragraph 5, which provides that each "State shall take the necessary measures to ensure that, under its criminal law, the fact that an offence referred to in this draft article was committed by a person holding an official position is not a ground for excluding criminal responsibility". For the purposes of the present draft articles, paragraph 5 means that an alleged offender cannot raise the fact of his or her official position as a substantive defence so as to negate any criminal responsibility. By contrast, paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law.[324] Further, paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction".

---

[317] Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, and commentaries thereto, *Yearbook … 1950*, vol. II, document A/1316 Part III, p. 375. Although principle III is based on article 7 of the Nürnberg Charter, the Commission omitted the phrase "or mitigating punishment", because it viewed mitigation as an issue "for the competent Court to decide" (*ibid.*, para. 104).

[318] Tokyo Charter, art. 6.

[319] *Yearbook … 1954*, vol. II, para. 50, art. 3.

[320] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, p. 26, art. 7.

[321] Rome Statute, art. 27, para. 1.

[322] Genocide Convention, art. IV.

[323] International Convention on the Suppression and Punishment of the Crime of Apartheid, art. III.

[324] See, for example, *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law".); *Situation in Darfur, Sudan in the Case of the Prosecutor v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09, decision under article 87 (7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017, Pre-Trial Chamber II, International Criminal Court, para. 109 ("[T]he Genocide Convention, unlike the [Rome] Statute in article 27 (2), does not mention immunities based on official capacity, and the majority does not see a

(32) The Commission did not find it necessary to include language in paragraph 5 specifying that one's official position cannot be raised as a ground for mitigation or reduction of sentence, because the issue of punishment is addressed in draft article 6, paragraph 7. According to that paragraph, States are required, in all circumstances, to ensure that crimes against humanity be punishable by appropriate penalties that take into account their grave nature. Such language should be understood as precluding the invoking of official position as a ground for mitigation or reduction of sentence.

Statutes of limitations

(33) One possible restriction on the prosecution of a person for crimes against humanity in national law concerns the application of a "statute of limitations" (or "period of prescription"), meaning a rule that forbids prosecution of an alleged offender for a crime that was committed more than a specified number of years prior to the initiation of the prosecution. Draft article 6, paragraph 6, provides that each State shall take the necessary measures to ensure that the offences referred to in the draft article shall not be subject to any statute of limitations.

(34) No rule on statute of limitations with respect to international crimes, including crimes against humanity, was established in the Nürnberg or Tokyo Charters, or in the constituent instruments of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone. In contrast, Control Council Law No. 10, adopted in December 1945 by the Allied Control Council for Germany to ensure the continued prosecution of alleged offenders, provided that in any trial or prosecution for crimes against humanity (as well as war crimes and crimes against the peace) "the accused shall not be entitled to the benefits of any statute of limitation in respect to the period from 30 January 1933 to 1 July 1945".[325] Likewise, the 1998 Rome Statute expressly addresses the matter, providing that: "The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations".[326] The drafters of the 1998 Rome Statute strongly supported this provision as applied to crimes against humanity.[327] Similarly, the Law on the Establishment of Extraordinary Chambers in Cambodia, the Supreme Iraqi Criminal Tribunal and the East Timor Tribunal Charter all explicitly defined crimes against humanity as offences for which there is no statute of limitations.[328]

(35) With respect to whether a statute of limitations may apply to the prosecution of an alleged offender in national courts, in 1967 the General Assembly noted that "the application to war crimes and crimes against humanity of the rule of municipal law relating to the period of limitation for ordinary crimes is a serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes".[329] The following year, States adopted the Convention on the Non-Applicability of

---

convincing basis for a constructive interpretation of the provisions in the Convention such that would give rise to an implicit exclusion of immunities. Article IV of the Convention speaks of individual criminal responsibility of 'persons committing genocide' — which, as convincingly explained by the International Court of Justice, must not be confused with immunity from criminal jurisdiction").

[325] Control Council Law No. 10 on Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. II, para. 5.

[326] Rome Statute, art. 29.

[327] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June-17 July 1998, document A/CONF.183/13 (vol. II), p. 138, 2nd meeting (A/CONF.183/C.1/SR.2), paras. 45-74.

[328] Extraordinary Chambers of Cambodia Agreement, art. 5; Supreme Iraqi Criminal Tribunal Statute, art. 17 (d); East Timor Tribunal Charter, sect. 17.1; see also report of the Third Committee (A/57/806), para. 10 (Khmer Rouge trials) and General Assembly resolution 57/228 B of 13 May 2003. Further, it should be noted that the Extraordinary Chambers in the Courts of Cambodia were provided jurisdiction over crimes against humanity committed decades prior to its establishment, between 1975 and 1979, when the Khmer Rouge held power.

[329] General Assembly resolution 2338 (XXII) of 18 December 1967, entitled "Question of the punishment of war criminals and of persons who have committed crimes against humanity"; see also

Statutory Limitations to War Crimes and Crimes against Humanity, which requires State parties to adopt "any legislative or other measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment" of these two types of crimes.[330] Similarly, in 1974, the Council of Europe adopted the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which uses substantially the same language.[331] At present, there appears to be no State with a law on crimes against humanity that also bars prosecution after a period of time has elapsed. Rather, numerous States have specifically legislated against any such limitation.

(36) Many treaties addressing crimes in national law other than crimes against humanity have not contained a prohibition on a statute of limitations. For example, the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contains no prohibition on the application of a statute of limitations to torture-related offences. Even so, the Committee against Torture has stated that, taking into account their grave nature, such offences should not be subject to any statute of limitations.[332] Similarly, while the 1966 International Covenant on Civil and Political Rights[333] does not directly address the issue, the Human Rights Committee has called for the abolition of statutes of limitations in relation to serious violations of the Covenant.[334] In contrast, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance does address the issue of statutes of limitations, providing that: "A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (a) Is of long duration and is proportionate to the extreme seriousness of this offence".[335] The *travaux préparatoires* of the Convention indicate that this provision was intended to distinguish between those offences that might constitute a crime against humanity — for which there should be no statute of limitations — and all other offences under the Convention.[336]

Appropriate penalties

(37) Draft article 6, paragraph 7, provides that each State shall ensure that the offences referred to in the article shall be punishable by appropriate penalties that take into account the grave nature of the offences.

(38) The Commission provided in its 1996 draft Code of Crimes against the Peace and Security of Mankind that: "An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime".[337] The commentary further

---

General Assembly resolution 2712 (XXV) of 15 December 1970; General Assembly resolution 2840 (XXVI) of 18 December 1971.

[330] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, art. IV.

[331] European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, art. 1.

[332] See, for example, report of the Committee against Torture, *Official Records of the General Assembly, Sixty-second Session, Supplement No. 44* (A/62/44), chap. III, consideration of reports by States parties under article 19 of the Convention, Italy, para. 40 (19).

[333] International Covenant on Civil and Political Rights, p. 171.

[334] See, for example, report of the Human Rights Committee, *Official Records of the General Assembly, Sixty-third Session, Supplement No. 40* (A/63/40), vol. I, chap. IV, consideration of reports submitted by States parties under article 40 of the Covenant and of country situations in the absence of a report resulting in public concluding observations, Panama (sect. A, para. 79), para. (7).

[335] International Convention for the Protection of All Persons from Enforced Disappearance, art. 8, para. 1 (a). In contrast, the Inter-American Convention on Forced Disappearance of Persons provides that criminal prosecution and punishment of all forced disappearances shall not be subject to statutes of limitations.

[336] Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), paras. 43-46 and 56.

[337] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, art. 3.

explained that the "character of a crime is what distinguishes that crime from another crime … The gravity of a crime is inferred from the circumstances in which it is committed and the feelings which impelled the author".[338] Thus, "while the criminal act is legally the same, the means and methods used differ, depending on varying degrees of depravity and cruelty. All of these factors should guide the court in applying the penalty".[339]

(39) To the extent that an international court or tribunal has jurisdiction over crimes against humanity, the penalties attached to such an offence may vary, but are expected to be appropriate given the gravity of the offence. The Statute of the International Criminal Tribunal for the Former Yugoslavia provides that: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[340] Furthermore, the International Criminal Tribunal for the Former Yugoslavia is to "take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".[341] The Statute of the International Criminal Tribunal for Rwanda includes identical language, except that recourse is to be had to "the general practice regarding prison sentences in the courts of Rwanda".[342] Even for convictions for the most serious crimes of international concern, this can result in a wide range of sentences. Article 77 of the 1998 Rome Statute also allows for flexibility of this kind, by providing for a term of imprisonment of up to 30 years or life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person".[343] Similar formulations may be found in the instruments regulating the Special Court for Sierra Leone,[344] the Special Tribunal for Lebanon,[345] the Special Panels for Serious Crimes in East Timor,[346] the Extraordinary Chambers in the Courts of Cambodia,[347] the Supreme Iraqi Criminal Tribunal,[348] and the Extraordinary African Chambers within the Senegalese Judicial System.[349] Likewise, to the extent that a national jurisdiction has criminalized crimes against humanity, the penalties attached to such an offence may vary, but are expected to be commensurate with the gravity of the offence.

(40) International treaties addressing crimes do not dictate to States parties the penalties to be imposed (or not to be imposed) but, rather, allow them the discretion to determine the punishment, based on the circumstances of the particular offender and offence.[350] The 1948 Convention on the Prevention and Punishment of the Crime of Genocide simply calls for "effective penalties for persons guilty of genocide or any of the other acts enumerated …".[351] The 1949 Geneva Conventions also provide a general standard and leave to individual States the discretion to set the appropriate punishment, by simply requiring: "The

---

[338] *Ibid.*, para. (3) of the commentary to art. 3.

[339] *Ibid.*

[340] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 1.

[341] *Ibid.*, art. 24, para. 2.

[342] Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 1.

[343] Rome Statute, art. 77.

[344] Statute of the Special Court for Sierra Leone, art. 19.

[345] Statute of the Special Tribunal for Lebanon, art. 24.

[346] East Timor Tribunal Charter, sect. 10.

[347] Extraordinary Chambers of Cambodia Agreement, art. 39.

[348] Supreme Iraqi Criminal Tribunal Statute, art. 24.

[349] Extraordinary African Chambers Statute, art. 24.

[350] See the report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), para. 58 (indicating that "[s]everal delegations welcomed the room for manoeuvre granted to States" in this provision); report of the Ad hoc Committee on the Drafting of an International Convention against the Taking of Hostages, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 39* (A/32/39), annex I (Summary records of the 1st to the 19th meetings of the Committee), 13th meeting (15 August 1977), para. 4 (similar comments by the representative of the United States of America); Commission on Human Rights resolution 2005/81 on impunity, para. 15 (calling upon "all States … to ensure that penalties are appropriate and proportionate to the gravity of the crime").

[351] Genocide Convention, art. V.

High Contracting Parties [to] undertake to enact any legislation necessary to provide effective penal sanctions for … any of the grave breaches of the present Convention …”.[252] More recent treaties addressing crimes in national legal systems typically indicate that the penalty should be “appropriate”. Although the Commission initially proposed the term “severe penalties” for use in its draft articles on diplomatic agents and other protected persons, the term “appropriate penalties” was instead used by States in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents.[253] That term has served as a model for subsequent treaties. At the same time, the provision on “appropriate” penalties in the 1973 Convention was accompanied by language calling for the penalty to take into account the “grave nature” of the offence. The Commission commented that such a reference was intended to emphasize that the penalty should take into account the important “world interests” at stake in punishing such an offence.[254] Since 1973, this approach — that each “State Party shall make these offences punishable by the appropriate penalties which take into account their grave nature” — has been adopted for numerous treaties, including the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[255] In some treaties, the issue of gravity is expressed using terms such as “extreme seriousness”, “serious nature” or “extreme gravity” of the offences.[256]

Legal persons

(41) Paragraphs 1 to 7 of draft article 6 are directed at criminal liability of offenders who are natural persons, although the term “natural” is not used, which is consistent with the approach taken in treaties addressing crimes. Paragraph 8, in contrast, addresses the liability of “legal persons” for the offences referred to in draft article 6.

(42) Criminal liability of legal persons has become a feature of the national laws of many States in recent years, but it is still unknown in many other States.[257] In States where the concept is known, such liability sometimes exists with respect to international crimes.[258] Acts that can lead to such liability are, of course, committed by natural persons, who act as officials, directors, officers, or through some other position or agency of the legal person. Such liability, in States where the concept exists, is typically imposed when the offence at issue was committed by a natural person on behalf of or for the benefit of the legal person.

(43) Criminal liability of legal persons has not featured significantly to date in the international criminal tribunals. The Nürnberg Charter, in articles 9 and 10, authorized the

---

[252] Geneva Convention I, art. 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, art. 146; see 2016 ICRC Commentary on art. 49 (footnote 205 above), paras. 2838-2846.

[253] See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 2, para. 2 (“[e]ach State Party shall make these crimes punishable by appropriate penalties …”).

[254] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), para. (12) of the commentary to draft article 2, para. 2.

[255] Convention against Torture, art. 4; see also Convention on the Safety of United Nations and Associated Personnel, art. 9, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 4 (b); International Convention for the Suppression of the Financing of Terrorism, art. 4 (b); OAU Convention on the Prevention and Combating of Terrorism, art. 2 (a).

[256] See, for example, International Convention for the Protection of All Persons from Enforced Disappearance, art. 7, para. 1; Inter-American Convention to Prevent and Punish Torture, art. 6; Inter-American Convention on Forced Disappearance of Persons, art. III.

[257] See, for example, *New TV S.A.L. Karma Mohamed Tashin Al Khayat*, Case No. STL-14-05/PT/AP/AR126.1, Decision of 2 October 2014 on interlocutory appeal concerning personal jurisdiction in contempt proceedings, Appeals Panel, Special Tribunal for Lebanon, para. 58 (“the practice concerning criminal liability of corporations and the penalties associated therewith varies in national systems”).

[258] See, for example, Ecuador Código Orgánico Integral Penal, *Registro Oficial, Suplemento, Año I, N° 180*, 10 February 2014, art. 90, Penalty for a legal person (providing, in a section addressing crimes against humanity, that: “When a legal person is responsible for any of the crimes of this Section, it will be penalized by its dissolution”).

International Military Tribunal to declare any group or organization as a criminal organization during the trial of an individual, which could lead to the trial of other individuals for membership in the organization. In the course of the Tribunal's proceedings, as well as subsequent proceedings under Control Council Law No. 10, a number of such organizations were so designated, but only natural persons were tried and punished.[359] The International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda did not have criminal jurisdiction over legal persons, nor does the Special Court for Sierra Leone, the Special Panels for Serious Crimes in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Supreme Iraqi Criminal Tribunal, or the Extraordinary African Chambers within the Senegalese Judicial System. The drafters of the 1998 Rome Statute noted that "[t]here is a deep divergence of views as to the advisability of including criminal responsibility of legal persons in the Statute"[360] and, although proposals for inclusion of a provision on such responsibility were made, the 1998 Rome Statute ultimately did not contain such a provision.

(44) Liability of legal persons also has not been included in many treaties addressing crimes at the national level, including: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; the 1949 Geneva Conventions; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents; the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the 1997 International Convention for the Suppression of Terrorist Bombings; and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind only addressed the criminal responsibility of "an individual".[361]

(45) On the other hand, the 2014 African Union protocol amending the statute of the African Court of Justice and Human Rights, though not yet in force, provides jurisdiction to the reconstituted African Court over legal persons for international crimes, including crimes against humanity.[362] Further, although criminal jurisdiction over legal persons (as well as over crimes against humanity) is not expressly provided for in the statute of the Special Tribunal for Lebanon, the Tribunal's Appeals Panel concluded in 2014 that the Tribunal had jurisdiction to prosecute a legal person for contempt of court.[363]

(46) Moreover, there are several treaties that address the liability of legal persons for criminal offences, notably: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid;[364] the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal;[365] the 1999

---

[359] See, for example, *United States v. Krauch and others*, in *Trials of War Criminals before the Nuernberg Military Tribunals (The I.G. Farben Case)*, vols. VII-VIII (Washington D.C., Nürnberg Military Tribunals, 1952).

[360] See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome, 15 June-17 July 1998, vol. III (A/CONF.183/13), document A/CONF.183/2, art. 23, para. 6, footnote 71.

[361] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, p. 23.

[362] See Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, art. 46C.

[363] *Al Khayat* (see footnote 357 above). The Tribunal ultimately found that the legal person, Al Jadeed TV, was not guilty. See *Al Jadeed [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/T/CJ, Contempt Judge, Decision of 18 September 2015, Special Tribunal for Lebanon, para. 55; *Al Jadeed [Co.] S.A.L./New T.V.S.A.L. (N.T.V.) Karma Mohamed Tahsin Al Khayat*, Case No. STL-14-05/A/AP, Appeals Panel, Decision of 8 March 2016.

[364] See International Convention on the Suppression and Punishment of the Crime of Apartheid, art. 1, para. 2 ("The States Parties to the present Convention declare criminal those organizations, institutions and individuals committing the crime of apartheid").

[365] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel, 22 March 1989), United Nations, *Treaty Series*, vol. 1673, No. 28911, p. 57, art. 2, para. 14 ("For the purposes of this Convention: … 'Person' means any natural or legal person") and

International Convention for the Suppression of the Financing of Terrorism;[366] the 2000 United Nations Convention against Transnational Organized Crime;[367] the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[368] the 2003 United Nations Convention against Corruption;[369] the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf;[370] and a series of treaties concluded within the Council of Europe.[371] Other regional instruments address the issue as well, mostly in the context of corruption.[372] Such treaties typically do not define the term "legal person", leaving it to national legal systems to apply whatever definition would normally operate therein.

(47) The Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In doing so, it has focused on language that has been widely accepted by States in the context of other crimes and that contains considerable flexibility for States in the implementation of their obligation.

(48) Paragraph 8 of draft article 6 is modelled on the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. The Optional Protocol was adopted by the General Assembly in 2000 and entered into force in 2002. As of July 2017, 173 States are party to the Optional Protocol and another 9 States have signed but not yet ratified it. Article 3, paragraph 1, of the Optional Protocol obligates States parties to ensure that certain acts are covered under its criminal or penal law, such as the sale of children for sexual exploitation or the offering of a child for prostitution. Article 3, paragraph 4, then reads: "Subject to the provisions of its national law, each State Party shall take measures, where appropriate, to establish the liability of legal persons for offences established in paragraph 1 of the present article. Subject to the legal principles of the State Party, such liability of legal persons may be criminal, civil or administrative".

---

art. 4, para. 3 ("The Parties consider that illegal traffic in hazardous wastes or other wastes is criminal").

[366] International Convention for the Suppression of the Financing of Terrorism, art. 5. For the proposals submitted during the negotiations that led to art. 5, see "Measures to eliminate international terrorism: report of the working group" (A/C.6/54/L.2) (26 October 1999).

[367] United Nations Convention against Transnational Organized Crime, art. 10.

[368] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (New York, 25 May 2000), United Nations, *Treaty Series*, vol. 2171, No. 27531, p. 227.

[369] United Nations Convention against Corruption, art. 26. For background, see United Nations Office on Drugs and Crime, *Travaux préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Corruption* (United Nations publication, Sales No. E.10.V.13), pp. 233-235 and *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, 2nd revised ed. (2012), pp. 107-113. For the analogous convention adopted by the Organisation for Economic Co-operation and Development, see Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Paris, 21 November 1997), art. 2 ("Each Party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official").

[370] Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (London, 14 October 2005), art. 5 (for the 1988 Convention and the Protocol thereto, see United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201).

[371] See, for example, Council of Europe, Criminal Law Convention on Corruption (Strasbourg, 27 January 1999), United Nations, *Treaty Series*, vol. 2216, No. 39391, p. 225, art. 18, supplemented by the Additional Protocol (Strasbourg, 15 May 2003) (relating to bribery of arbitrators and jurors), *ibid.*, vol. 2466, No. 39391, p. 168; European Convention on the Suppression of Terrorism (Strasbourg, 27 January 1977), *ibid.*, vol. 1137, No. 17828, p. 93, art. 10.

[372] See, for example, Inter-American Convention against Corruption (Caracas, 29 March 1996, ILM, vol. 35, No. 3 (May 1996), p. 727, at, art. 8; Southern African Development Community Protocol against Corruption (Blantyre, Malawi, 14 August 2001), art. 4, para. 2; African Union Convention on Preventing and Combating Corruption (Maputo, 11 July 2003), art. 11, para. 1.

(49) Paragraph 8 of draft article 6 uses the same language, but replaces "State Party" with "State" and replaces "for offences established in paragraph 1 of the present article" with "for the offences referred to in this draft article". As such, paragraph 8 imposes an obligation upon the State that it "shall take measures", meaning that it is required to pursue such measures in good faith. At the same time, paragraph 8 provides the State with considerable flexibility to shape those measures in accordance with its national law. First, the clause "[s]ubject to the provisions of its national law" should be understood as according to the State considerable discretion as to the measures that will be adopted; the obligation is "subject to" the State's existing approach to liability of legal persons for criminal offences under its national law. For example, in most States, liability of legal persons for criminal offences will only apply under national law with respect to certain types of legal persons and not to others. Indeed, under most national laws, "legal persons" in this context likely excludes States, Governments, other public bodies in the exercise of State authority, and public international organizations.[373] Likewise, the liability of legal persons under national laws can vary based on: the range of natural persons whose conduct can be attributed to the legal person; which modes of liability of natural persons can result in liability of the legal person; whether it is necessary to prove the *mens rea* of a natural person to establish liability of the legal person; or whether it is necessary to prove that a specific natural person committed the offence.[374]

(50) Second, each State is obliged to take measures to establish the legal liability of legal persons "where appropriate". Even if the State, under its national law, is in general able to impose liability upon legal persons for criminal offences, the State may conclude that such a measure is inappropriate in the specific context of crimes against humanity.

(51) For measures that are adopted, the second sentence of paragraph 8 provides that: "Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative". Such a sentence appears not just in the 2000 Optional Protocol, as discussed above, but also in other widely adhered-to treaties, such as the 2000 United Nations Convention against Transnational Organized Crime[375] and the 2003 United Nations Convention against Corruption.[376] The flexibility indicated in such language again acknowledges and accommodates the diversity of approaches adopted within national legal systems. As such, there is no obligation to establish criminal liability if doing so is inconsistent with a State's national legal principles; in those cases, a form of civil or administrative liability may be used as an alternative. In any event, whether criminal, civil or administrative, such liability is without prejudice to the criminal liability of natural persons provided for in draft article 6.

Article 7
Establishment of national jurisdiction

1. Each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in the following cases:

---

[373] The Council of Europe Criminal Law Convention on Corruption makes explicit such exclusion (see, for example, art. 1 (d), "For the purposes of this Convention: … 'legal person' shall mean any entity having such status under the applicable national law, except for States or other public bodies in the exercise of State authority and for public international organisations").

[374] For a brief overview of divergences in various common law and civil law jurisdictions on liability of legal persons, see *Al Jadeed*, Contempt Judge, Decision of 18 September 2015 (see footnote 363 above), paras. 63-67.

[375] United Nations Convention against Transnational Organized Crime, art. 10, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative".); see also the International Convention for the Suppression of the Financing of Terrorism, art. 5, para. 1 ("Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for the management or control of that legal entity has, in that capacity, committed an offence set forth in article 2. Such liability may be criminal, civil or administrative").

[376] United Nations Convention against Corruption, art. 26, para. 2 ("Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative").

(a) when the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

(b) when the alleged offender is a national of that State or, if that State considers it appropriate, a stateless person who is habitually resident in that State's territory;

(c) when the victim is a national of that State if that State considers it appropriate.

2. Each State shall also take the necessary measures to establish its jurisdiction over the offences referred covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite or surrender the person in accordance with the present draft articles.

3. The present draft articles do not exclude the exercise of any criminal jurisdiction established by a State in accordance with its national law.

Commentary

(1) Draft article 7 provides that each State must establish jurisdiction over the offences covered by the present draft articles in certain cases, such as when the crime occurs in territory under its jurisdiction, has been committed by one of its nationals or when the offender is present in territory under its jurisdiction.

(2) As a general matter, international instruments have sought to encourage States to establish a relatively wide range of jurisdictional bases under national law to address the most serious crimes of international concern, so that there is no safe haven for those who commit the offence. Thus, according to the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind, "each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes" set out in the draft Code, other than the crime of aggression, "irrespective of where or by whom those crimes were committed".[377] The breadth of such jurisdiction was necessary because: "The Commission considered that the effective implementation of the Code required a combined approach to jurisdiction based on the broadest jurisdiction of national courts together with the possible jurisdiction of an international criminal court".[378] The preamble to the 1998 Rome Statute provides "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level", and further "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".

(3) As such, when treaties concerning crimes address national law implementation, they typically include a provision on the establishment of national jurisdiction. For example, discussions within a working group of the Human Rights Commission convened to draft an international instrument on enforced disappearance concluded that: "The establishment of the broadest possible jurisdiction for domestic criminal courts in respect of enforced disappearance appeared to be essential if the future instrument was to be effective".[379] At the same time, such treaties typically only obligate a State party to exercise its jurisdiction when an alleged offender is present in the State party's territory (see draft article 9 below), leading either to a submission of the matter to the prosecuting authorities within that State party or to extradition or surrender of the alleged offender to another State party or competent international tribunal (see draft article 10 below).

(4) Reflecting on the acceptance of such an obligation in treaties, and in particular within the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading

---

[377] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D, art. 8.

[378] *Ibid.*, para. (5) of the commentary to art. 8.

[379] Commission on Human Rights, report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2003/71), para. 65.

Treatment or Punishment, the International Court of Justice, in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, stated:

> The obligation for the State to criminalize torture and to establish its jurisdiction over it finds its equivalent in the provisions of many international conventions for the combating of international crimes. This obligation, which has to be implemented by the State concerned as soon as it is bound by the Convention, has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to coordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.[380]

(5) Provisions comparable to those appearing in draft article 7 exist in many treaties addressing crimes.[381] While no treaty yet exists relating to crimes against humanity, Judges Higgins, Kooijmans and Buergenthal indicated in their separate opinion in the case concerning the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* that:

> The series of multilateral treaties with their special jurisdictional provisions reflect a determination by the international community that those engaged in war crimes, hijacking, hostage taking [and] torture should not go unpunished. Although crimes against humanity are not yet the object of a distinct convention, a comparable international indignation at such acts is not to be doubted.[382]

(6) Draft article 7, paragraph 1 (a), requires that jurisdiction be established when the offence occurs in the State's territory, a type of jurisdiction often referred to as "territorial jurisdiction". Rather than refer solely to a State's "territory", the Commission considered it appropriate to refer to territory "under [the State's] jurisdiction" which, as was the case for draft article 4, is intended to encapsulate the territory *de jure* of the State, as well as other territory under its jurisdiction. Further, territorial jurisdiction often encompasses jurisdiction over crimes committed on board a vessel or aircraft registered to the State; indeed, States that have adopted national laws on crimes against humanity typically establish jurisdiction over acts occurring on such a vessel or aircraft.

(7) Draft article 7, paragraph 1 (b), calls for jurisdiction when the alleged offender is a national of the State, a type of jurisdiction at times referred to as "nationality jurisdiction" or "active personality jurisdiction". Paragraph 1 (b) also indicates that the State may, on an optional basis, establish jurisdiction where the offender is "a stateless person who is habitually resident in the territory of that State". This formulation is based on the language of certain existing conventions, such as article 5, paragraph 1 (b), of the 1979 International Convention Against the Taking of Hostages.

(8) Draft article 7, paragraph 1 (c), concerns jurisdiction when the victim of the offence is a national of the State, a type of jurisdiction at times referred to as "passive personality

---

[380] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 451, para. 75.

[381] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 5, para. 1 (a)-(b); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 3; International Convention against the Taking of Hostages, art. 5; Inter-American Convention to Prevent and Punish Torture, art. 12; Convention against Torture, art. 5; Convention on the Safety of United Nations and Associated Personnel, art. 10; Inter-American Convention on Forced Disappearance of Persons, art. IV; International Convention for the Suppression of Terrorist Bombings, art. 6; International Convention for the Suppression of the Financing of Terrorism, art. 7; OAU Convention on the Prevention and Combating of Terrorism, art. 6, para. 1; United Nations Convention against Transnational Organized Crime, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 9, paras. 1-2; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VII, paras. 1-3.

[382] *Arrest Warrant of 11 April 2000* (see footnote 324 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

jurisdiction". Given that many States prefer not to exercise this type of jurisdiction, this jurisdiction is optional; a State may establish such jurisdiction "if that State considers it appropriate", but the State is not obliged to do so. This formulation is also based on the language of a wide variety of existing conventions.

(9) Draft article 7, paragraph 2, addresses a situation where the other types of jurisdiction may not exist, but the alleged offender "is present" in the territory under the State's jurisdiction and the State does not extradite or surrender the person in accordance with the present draft articles. In such a situation, even if the crime was not committed in its territory, the alleged offender is not its national and the victims of the crime are not its nationals, the State nevertheless is obligated to establish jurisdiction given the presence of the alleged offender in territory under its jurisdiction. This obligation helps to prevent an alleged offender from seeking refuge in a State that otherwise has no connection with the offence.

(10) Draft article 7, paragraph 3, makes clear that, while each State is obligated to enact these types of jurisdiction, it does not exclude any other jurisdiction that is available under the national law of that State. Indeed, to preserve the right of States parties to establish national jurisdiction beyond the scope of the treaty, and without prejudice to any applicable rules of international law, treaties addressing crimes typically leave open the possibility that a State party may have established other jurisdictional grounds upon which to hold an alleged offender accountable.[383] In their joint separate opinion in the *Arrest Warrant* case, Judges Higgins, Kooijmans and Buergenthal cited, *inter alia*, such a provision in the Convention against Torture, and stated:

> We reject the suggestion that the battle against impunity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters. Great care has been taken when formulating the relevant treaty provisions not to exclude other grounds of jurisdiction that may be exercised on a voluntary basis.[384]

(11) Establishment of the various types of national jurisdiction set out in draft article 7 are important for supporting an *aut dedere aut judicare* obligation, as set forth in draft article 10 below. In his separate opinion in the *Arrest Warrant* case, Judge Guillaume remarked on the "system" set up under treaties of this sort:

> Whenever the perpetrator of any of the offences covered by these conventions is found in the territory of a State, that State is under an obligation to arrest him, and then extradite or prosecute. *It must have first conferred jurisdiction on its courts to try him if he is not extradited.* Thus, universal punishment of all the offences in question is assured, as the perpetrators are denied refuge in all States.[385]

Article 8
Investigation

Each State shall ensure that its competent authorities proceed to a prompt and impartial investigation whenever there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in any territory under its jurisdiction.

---

[383] See Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, revised draft United Nations Convention against Transnational Organized Crime (A/AC.254/4/Rev.4), footnote 102, p. 20; see also Council of Europe, *Explanatory Report to the Criminal Law Convention on Corruption*, European Treaty Series, No. 173, para. 83 ("Jurisdiction is traditionally based on territoriality or nationality. In the field of corruption these principles may, however, not always suffice to exercise jurisdiction, for example over cases occurring outside the territory of a Party, not involving its nationals, but still affecting its interests (e.g. national security). Paragraph 4 of this article allows the Parties to establish, in conformity with their national law, other types of jurisdiction as well").

[384] *Arrest Warrant of 11 April 2000* (see footnote 324 above), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 51.

[385] *Ibid.*, Separate Opinion of Judge Guillaume, para. 9 (emphasis added).

Commentary

(1) Draft article 8 addresses situations where there is reasonable ground to believe that acts constituting crimes against humanity have been or are being committed in territory under a State's jurisdiction. That State is best situated to conduct such an investigation, so as to determine whether crimes in fact have occurred or are occurring and, if so, whether governmental forces under its control committed the crimes, whether forces under the control of another State did so or whether they were committed by members of a non-State organization. Such an investigation can lay the foundation not only for identifying alleged offenders and their location, but also for helping to prevent the continuance of ongoing crimes or their recurrence by identifying their source. Such an investigation should be contrasted with a preliminary inquiry into the facts concerning a particular alleged offender who is present in a State, which is addressed below in draft article 9, paragraph 2.

(2) A comparable obligation has featured in some treaties addressing other crimes.[386] For example, article 12 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides: "Each State Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction". That obligation is different from the State party's obligation under article 6, paragraph 2, of the 1984 Convention against Torture to undertake an inquiry into the facts concerning a particular alleged offender. As indicated, article 12 of the 1984 Convention against Torture requires that the investigation be carried out whenever there is "reasonable ground to believe" that the offence has been committed, regardless of whether victims have formally filed complaints with the State's authorities.[387] Indeed, since it is likely that the more systematic the practice of torture is in a given country, the fewer the number of official torture complaints that will be made, a violation of article 12 of the 1984 Convention against Torture is possible even if the State has received no such complaints. The Committee against Torture has indicated that State authorities must "proceed automatically" to an investigation whenever there are reasonable grounds to believe that an act of torture or ill-treatment has been committed, with "no special importance being attached to the grounds for the suspicion".[388]

(3) The Committee against Torture has also found violations of article 12 if the State's investigation is not "prompt and impartial".[389] The requirement of promptness means that as soon as there is suspicion of a crime having been committed, investigations should be initiated immediately or without any delay. In most cases where the Committee found a lack of promptness, no investigation had been carried out at all or had only been commenced after a long period of time had passed. For example, the Committee considered "that a delay of 15 months before an investigation of allegations of torture is initiated, is unreasonably long and not in compliance with the requirement of article 12 of the Convention".[390] The rationale underlying the promptness requirement is that physical traces

---

[386] See, for example, Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 2; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, *European Treaty Series*, No. 210, art. 55, para. 1.

[387] See *Encarnación Blanco Abad v. Spain*, communication No. 59/1996, 14 May 1998, para. 8.2, in report of the Committee against Torture, *Official Records of the General Assembly, Fifty-third Session, Supplement No. 44* (A/53/44), annex X, sect. A.3; *Danilo Dimitrijevic v. Serbia and Montenegro*, communication No. 172/2000, 16 November 2005, para. 7.3, *ibid., Sixty-first Session, Supplement No. 44* (A/61/44), annex VIII, sect. A.

[388] See *Dhaou Belgacem Thabti v. Tunisia*, communication No. 187/2001, 14 November 2003, para. 10.4, *ibid., Fifty-ninth Session, Supplement No. 44* (A/59/44), annex VII, sect. A.

[389] See, for example, *Bairamov v. Kazakhstan*, communication No. 497/2012, 14 May 2014, paras. 8.7-8.8, *ibid., Sixty-ninth Session, Supplement No. 44* (A/69/44), annex XIV.

[390] *Qani Halimi-Nedzibi v. Austria*, communication No. 8/1991, 18 November 1993, para. 13.5, *ibid., Forty-ninth Session, Supplement No. 44* (A/49/44), annex V.

that may prove torture can quickly disappear and that victims may be in danger of further torture, which a prompt investigation may be able to prevent.[391]

(4) The requirement of impartiality means that States must proceed with their investigations in a serious, effective and unbiased manner. In some instances, the Committee against Torture has recommended that investigation of offences be "under the direct supervision of independent members of the judiciary".[392] In other instances, it has stated that "all government bodies not authorized to conduct investigations into criminal matters should be strictly prohibited from doing so".[393] The Committee has stated that an impartial investigation gives equal weight to assertions that the offence did or did not occur, and then pursues appropriate avenues of inquiry, such as checking available government records, examining relevant government officials or ordering exhumation of bodies.[394]

(5) Some treaties that do not expressly contain such an obligation to investigate have nevertheless been read as implicitly containing one. For example, although the 1966 International Covenant on Civil and Political Rights contains no such express obligation, the Human Rights Committee has repeatedly asserted that States must investigate, in good faith, violations of the Covenant.[395] Regional human rights bodies have also interpreted their legal instruments as implicitly containing a duty to conduct an investigation.[396]

Article 9
Preliminary measures when an alleged offender is present

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State in the territory under whose jurisdiction a person alleged to have committed any offence covered by the present draft articles is present shall take the person into custody or take other legal measures to ensure his or her presence. The custody and other legal measures shall be as provided in the law of that State, but may be continued only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.

3. When a State, pursuant to this draft article, has taken a person into custody, it shall immediately notify the States referred to in draft article 7, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his or her detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this draft article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

---

[391] *Encarnación Blanco Abad v. Spain* (see footnote 387 above), para. 8.2.

[392] Report of the Committee against Torture, *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 44* (A/49/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Ecuador, paras. 97-105, at para. 105.

[393] *Ibid., Fifty-sixth Session, Supplement No. 44* (A/56/44), chap. IV, consideration of reports submitted by States parties under article 19 of the Convention, Guatemala, paras. 67-76, at para. 76 (d).

[394] *Khaled Ben M'Barek v. Tunisia*, communication No. 60/1996, 10 November 1999, paras. 11.9-11.10, *ibid., Fifty-fifth Session, Supplement No. 44* (A/55/44), annex VIII, sect. A.

[395] See Human Rights Committee, general comment No. 31, para. 15; see also *Nazriev v. Tajikistan*, communication No. 1044/2002, Views adopted on 17 March 2006, para. 8.2, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 40* (A/61/40), vol. II, annex V, sect. P); *Kouidis v. Greece*, communication No. 1070/2002, views adopted on 28 March 2006, para. 9, *ibid.*, sect. T; *Agabekov v. Uzbekistan*, communication No. 1071/2002, views adopted on 16 March 2007, para. 7.2, *ibid., Sixty-second Session, Supplement No. 40* (A/62/40), vol. II, annex VII, sect. I; *Karimov v. Tajikistan* and *Nursatov v. Tajikistan*, communication Nos. 1108/2002 and 1121/2002, Views adopted on 26 March 2007, para. 7.2, *ibid.*, sect. H.

[396] See, for example, *Ergi v. Turkey*, Judgment, 28 July 1998, European Court of Human Rights, *Reports of Judgments and Decisions 1998-IV*, paras. 82 and 85-86; *Bati and Others v. Turkey*, Application Nos. 33097/96 and 57834/00, Final Judgment of 3 September 2004, First Section, European Court of Human Rights, ECHR 2004-IV, para. 133; *Paniagua Morales et al. v. Guatemala*, judgment of 8 March 1998, Inter-American Court of Human Rights, Series C, No. 37; *Extrajudicial Executions and Forced Disappearances of Persons v. Peru, Report No. 101/01*, 11 October 2001, Inter-American Commission of Human Rights, OEA/Ser./L/V/II.114 doc. 5 rev., p. 563.

Commentary

(1) Draft article 9 provides for certain preliminary measures to be taken by the State in the territory under whose jurisdiction an alleged offender is present. Paragraph 1 calls upon the State to take the person into custody or take other legal measures to ensure his or her presence, in accordance with that State's law, but only for such time as is necessary to enable any criminal, extradition or surrender proceedings to be instituted. Such measures are a common step in national criminal proceedings, in particular to avoid further criminal acts and a risk of flight by the alleged offender.

(2) Paragraph 2 provides that the State shall immediately make a preliminary inquiry into the facts. The national criminal laws of States typically provide for such a preliminary inquiry to determine whether a prosecutable offence exists.

(3) Paragraph 3 provides that the State shall also immediately notify the States referred to in draft article 7, paragraph 1, of its actions, and whether it intends to exercise jurisdiction. Doing so allows those other States to consider whether they wish to exercise jurisdiction, in which case they might seek extradition. In some situations, the State may not be fully aware of which other States have established jurisdiction (such as a State that optionally has established jurisdiction with respect to a stateless person who is habitually resident in that State's territory); in such situations, the feasibility of fulfilling the obligation may depend on the circumstances.

(4) Both the General Assembly and the Security Council have recognized the importance of such preliminary measures in the context of crimes against humanity. Thus, the General Assembly has called upon "all the States concerned to take the necessary measures for the thorough investigation of … crimes against humanity … and for the detection, arrest, extradition and punishment of all … persons guilty of crimes against humanity who have not yet been brought to trial or punished".[397] Similarly, it has said that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of … crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law".[398] The Security Council has emphasized "the responsibility of States to comply with their relevant obligations to end impunity and to thoroughly investigate and prosecute persons responsible for … crimes against humanity or other serious violations of international humanitarian law in order to prevent violations, avoid their recurrence and seek sustainable peace, justice, truth and reconciliation".[399]

(5) Treaties addressing crimes typically provide for such preliminary measures,[400] such as article 6 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[401] Reviewing, *inter alia*, the provisions contained in article 6, the International Court of Justice has explained that "incorporating the appropriate legislation into domestic law … would allow the State in whose territory a suspect is present immediately to make a preliminary inquiry into the facts …, a necessary step in order to enable that State, with knowledge of the facts, to submit the case to its competent

---

[397] General Assembly resolution 2583 (XXIV) of 15 December 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 1.

[398] General Assembly resolution 2840 (XXVI) of 18 December 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, para. 4.

[399] Security Council resolution 1894 (2009) of 11 November 2009, para. 10.

[400] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6; International Convention against the Taking of Hostages, art. 6; Inter-American Convention to Prevent and Punish Torture, art. 8; International Convention for the Suppression of Terrorist Bombings, art. 7; International Convention for the Suppression of the Financing of Terrorism, art. 9; OAU Convention on the Prevention and Combating of Terrorism, art. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII.

[401] Convention against Torture, art. 6

authorities for the purpose of prosecution …".[402] The Court found that the preliminary inquiry is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. Those authorities who conduct the inquiry have the task of drawing up a case file containing relevant facts and evidence; "this may consist of documents or witness statements relating to the events at issue and to the suspect's possible involvement in the matter concerned".[403] The Court further noted that "the choice of means for conducting the inquiry remains in the hands of the States Parties", but that "steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case".[404] Further, the purpose of such preliminary measures is "to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the objective and purpose of the Convention, which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts".[405]

Article 10
Aut dedere aut judicare

> The State in the territory under whose jurisdiction the alleged offender is present shall submit the case to its competent authorities for the purpose of prosecution, unless it extradites or surrenders the person to another State or competent international criminal tribunal. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Commentary

(1) Draft article 10 obliges a State, in the territory under whose jurisdiction an alleged offender is present, to submit the alleged offender to prosecution within the State's national system. The only alternative means of meeting this obligation is if the State extradites or surrenders the alleged offender to another State or competent international criminal tribunal that is willing and able itself to submit the matter to prosecution. This obligation is commonly referred to as the principle of *aut dedere aut judicare*, a principle that has been recently studied by the Commission[406] and that is contained in numerous multilateral treaties addressing crimes.[407] While a literal translation of *aut dedere aut judicare* may not fully capture the meaning of this obligation, the Commission chose to retain the term in the title, given its common use when referring to an obligation of this kind.

(2) The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind defined crimes against humanity in article 18 and further provided, in article 9, that: "Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in article 17, 18, 19 or 20 is found shall extradite or prosecute that individual".[408]

---

[402] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 380 above), p. 450, para. 72.

[403] *Ibid.*, p. 453, para. 83.

[404] *Ibid.*, p. 454, para. 86.

[405] *Ibid.*, p. 451, para. 74.

[406] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI.

[407] Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", study by the Secretariat (A/CN.4/630).

[408] *Yearbook … 1996*, vol. II (Part Two), chap. II, sect. D (art. 9); see also Commission on Human Rights resolution 2005/81 on impunity, para. 2 (recognizing "that States must prosecute or extradite perpetrators, including accomplices, of international crimes such as … crimes against humanity … in accordance with their international obligations in order to bring them to justice, and urg[ing] all States to take effective measures to implement these obligations").

(3) Most multilateral treaties containing such an obligation[409] use what is referred to as "the Hague formula", after the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft.[410] Under that formula, the obligation arises whenever the alleged offender is present in the territory of the State party, regardless of whether some other State party seeks extradition. Although regularly termed the obligation to extradite or "prosecute", the obligation is to "submit the case to its competent authorities for the purpose of prosecution", meaning to submit the matter to prosecutorial authorities, which may or may not decide to prosecute. In particular, if the competent authorities determine that there is insufficient evidence of guilt, then the accused need not be indicted, nor stand trial or face punishment.[411] The *travaux préparatoires* of the Convention for the 1970 Suppression of Unlawful Seizure of Aircraft indicate that the formula established "the obligation of apprehension of the alleged offender, a possibility of extradition, the obligation of reference to the competent authority and the possibility of prosecution".[412]

(4) In the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, the International Court of Justice analysed the Hague formula in the context of article 7 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:

> "90. As is apparent from the *travaux préparatoires* of the Convention, Article 7, paragraph 1, is based on a similar provision contained in the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970. The obligation to submit the case to the competent authorities for the purpose of prosecution (hereinafter the 'obligation to prosecute') was formulated in such a way as to leave it to those authorities to decide whether or not to initiate proceedings, thus respecting the independence of States parties' judicial systems. These two conventions emphasize, moreover, that the authorities shall take their

---

[409] See Organization of American States (OAS), Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion that are of International Significance (Washington, D.C., 2 February 1971), United Nations, *Treaty Series*, vol. 1438, No. 24371, p. 195, art. 5; Organization of African Unity Convention for the Elimination of Mercenarism in Africa (Libreville, 3 July 1977), *ibid.*, vol. 1490, No. 25573, p. 89, arts. 8 and 9, paras. 2-3; European Convention on the Suppression of Terrorism, art. 7; Inter-American Convention to Prevent and Punish Torture, art. 14; South Asian Association for Regional Cooperation (SAARC) Regional Convention on Suppression of Terrorism (Kathmandu, 4 November 1987), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 174; Inter-American Convention on Forced Disappearance of Persons, art. 6; Inter-American Convention on International Traffic in Minors (Mexico, 18 March 1994), OAS, *Treaty Series*, No. 79, art. 9; Inter-American Convention against Corruption, art. 13, para. 6; Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials (Washington, D.C., 14 November 1997), art. 19, para. 6; League of Arab States, Arab Convention on the Suppression of Terrorism (Cairo, 22 April 1998), in *International Instruments related to the Prevention and Suppression of International Terrorism*, United Nations publication, Sales No. E.08.V.2 (New York, 2008), p. 178; Council of Europe, Criminal Law Convention on Corruption, art. 27, para. 5; Convention of the Organisation of the Islamic Conference on Combating International Terrorism (Ouagadougou, 1 July 1999), annex to resolution 59/26-P, art. 6; Council of Europe, Convention on Cybercrime (Budapest, 23 November 2001), *European Treaty Series*, No. 185, art. 24, para. 6; African Union Convention on Preventing and Combating Corruption, art. 15, para. 6; Council of Europe, Convention on the Prevention of Terrorism (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 196, art. 18; Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005), *Council of Europe Treaty Series*, No. 197, art. 31, para. 3; and Association of Southeast Asian Nations Convention on Counter Terrorism, art. XIII, para. 1.

[410] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 7.

[411] Survey of multilateral conventions which may be of relevance for the work of the International Law Commission on the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)", study by the Secretariat (A/CN.4/630), pp. 74-75.

[412] Statement of Chairperson Gilbert Guillaume (delegate from France), International Civil Aviation Organization, *Legal Committee, Seventeenth Session, Montreal, 9 February-11 March 1970, Minutes and Documents relating to the Subject of Unlawful Seizure of Aircraft* (Montreal, 1970), 30th meeting (3 March 1970) (Doc. 8877-LC/161), para. 15.

return to the status quo *ex ante*, may be an appropriate form of reparation and includes the ability for a victim to return to his or her home, the return of moveable property, or the reconstruction of public or private buildings, including schools, hospitals and places of religious worship. Compensation may be appropriate with respect to both material and moral damages. Rehabilitation programmes for large numbers of persons in certain circumstances may be required, such as programmes for medical treatment, provision of prosthetic limbs, or trauma-focused therapy. Satisfaction, such as issuance of a statement of apology or regret, may also be a desirable form of reparation. Likewise, reparation for a crime against humanity might consist of assurances or guarantees of non-repetition.

(19) The illustrative list of forms of reparation, however, is preceded by the words "as appropriate". Such wording acknowledges that States must have some flexibility and discretion to determine the appropriate form of reparation, recognizing that, in the aftermath of crimes against humanity, various scenarios may arise, including those of transitional justice, and reparations must be tailored to the specific context. For example, in some situations, a State may be responsible for crimes against humanity while, in other situations, non-State actors may be responsible. The crimes may have involved mass atrocities in circumstances where, in their wake, a State may be struggling to rebuild itself, leaving it with limited resources or any capacity to provide material redress to victims. The ability of any given perpetrator to make reparation will also vary. Paragraph 3 is without prejudice to other obligations of States that exist under international law.

(20) Paragraph 3 provides that such reparation may be "on an individual or collective basis". While reparation specific to each of the victims may be warranted, such as through the use of regular civil claims processes in national courts or through a specially designed process of mass claims compensation, in some situations only collective forms of reparation may be feasible or preferable, such as the building of monuments of remembrance or the reconstruction of schools, hospitals, clinics and places of worship. In still other situations, a combination of individual and collective reparations may be appropriate.

(21) Support for this approach may be seen in the approach to reparations taken by international criminal tribunals. The statutes of the international criminal tribunals for the former Yugoslavia and for Rwanda contained provisions exclusively addressing the possibility of restitution of property, not compensation or other forms of reparation.[493] Yet, when establishing other international criminal tribunals, States appear to have recognized that focusing solely on restitution is inadequate (instead the more general term "reparation" is used) and that establishing only an individual right to reparation for each victim may be problematic in the context of a mass atrocity. Instead, allowance is made for the possibility of reparation for individual victims or for reparation on a collective basis.[494] For example, the Rules of Procedure and Evidence of the International Criminal Court provide that, in awarding reparation to victims pursuant to article 75, "the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both", taking into account the scope and extent of any damage, loss or injury.[495] In the context of the atrocities in Cambodia under the Khmer Rouge, only "collective and moral reparations" are envisaged under the Internal Rules of the Extraordinary Chambers in the Courts of Cambodia.[496]

Article 13
Extradition

1. Each of the offences covered by the present draft articles shall be deemed to be included as an extraditable offence in any extradition treaty existing between

---

[493] Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 24, para. 3; Statute of the International Criminal Tribunal for Rwanda, art. 23, para. 3.

[494] See, for example, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principle 13.

[495] Rules of Procedure and Evidence of the International Criminal Court, rule 97, para. 1.

[496] Internal Rules of the Extraordinary Chambers in the Court of Cambodia (Rev. 9) as revised on 16 January 2015, rules 23 and 23 *quinquies*.

decision in the same manner as in the case of any ordinary offence of a serious nature under the law of the State concerned (Article 7, paragraph 2, of the Convention against Torture and Article 7 of the Hague Convention of 1970). It follows that the competent authorities involved remain responsible for deciding on whether to initiate a prosecution, in the light of the evidence before them and the relevant rules of criminal procedure.

91. The obligation to prosecute provided for in Article 7, paragraph 1, is normally implemented in the context of the Convention against Torture after the State has performed the other obligations provided for in the preceding articles, which require it to adopt adequate legislation to enable it to criminalize torture, give its courts universal jurisdiction in the matter and make an inquiry into the facts. These obligations, taken as a whole, may be regarded as elements of a single conventional mechanism aimed at preventing suspects from escaping the consequences of their criminal responsibility, if proven …

…

94. The Court considers that Article 7, paragraph 1, requires the State concerned to submit the case to its competent authorities for the purpose of prosecution, irrespective of the existence of a prior request for the extradition of the suspect. That is why Article 6, paragraph 2, obliges the State to make a preliminary inquiry immediately from the time that the suspect is present in its territory. The obligation to submit the case to the competent authorities, under Article 7, paragraph 1, may or may not result in the institution of proceedings, in the light of the evidence before them, relating to the charges against the suspect.

95. However, if the State in whose territory the suspect is present has received a request for extradition in any of the cases envisaged in the provisions of the Convention, it can relieve itself of its obligation to prosecute by acceding to that request. It follows that the choice between extradition or submission for prosecution, pursuant to the Convention, does not mean that the two alternatives are to be given the same weight. Extradition is an option offered to the State by the Convention, whereas prosecution is an international obligation under the Convention, the violation of which is a wrongful act engaging the responsibility of the State.

…

114. While Article 7, paragraph 1, of the Convention does not contain any indication as to the time frame for performance of the obligation for which it provides, it is necessarily implicit in the text that it must be implemented within a reasonable time, in a manner compatible with the object and purpose of the Convention.

115. The Court considers that the obligation on a State to prosecute, provided for in Article 7, paragraph 1, of the Convention, is intended to allow the fulfilment of the Convention's object and purpose, which is 'to make more effective the struggle against torture' (Preamble to the Convention). It is for that reason that proceedings should be undertaken without delay.

…

120. The purpose of these treaty provisions is to prevent alleged perpetrators of acts of torture from going unpunished, by ensuring that they cannot find refuge in any State party. The State in whose territory the suspect is present does indeed have the option of extraditing him to a country which has made such a request, but on the condition that it is to a State which has jurisdiction in some capacity, pursuant to Article 5 of the Convention, to prosecute and try him."[413]

---

[413] *Questions relating to the Obligation to Prosecute or Extradite* (see footnote 380 above), pp. 454-461, paras. 90-91, 94-95, 114-115 and 120.

States. States undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. For the purposes of extradition between States, an offence covered by the present draft articles shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

3. If a State that makes extradition conditional on the existence of a treaty receives a request for extradition from another State with which it has no extradition treaty, it may consider the present draft articles as the legal basis for extradition in respect of any offence covered by the present draft articles.

4. A State that makes extradition conditional on the existence of a treaty shall, for any offence covered by the present draft articles:

(a) inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for cooperation on extradition with other States; and

(b) if it does not use the present draft articles as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States in order to implement this draft article.

5. States that do not make extradition conditional on the existence of a treaty shall recognize the offences covered by the present draft articles as extraditable offences between themselves.

6. Extradition shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition.

7. If necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1.

8. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State, the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof.

9. Nothing in the present draft articles shall be interpreted as imposing an obligation to extradite if the requested State has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's gender, race, religion, nationality, ethnic origin, culture, membership of a particular social group, political opinions, or other grounds that are universally recognized as impermissible under international law, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

10. Before refusing extradition, the requested State shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

Commentary

(1) Draft article 13 addresses the rights, obligations and procedures applicable to the extradition of an alleged offender under the present draft articles. Extradition normally refers to the process whereby one State (the requesting State) asks another State (the requested State) to send to the requesting State someone present in the requested State in order that he or she may be brought to trial on criminal charges in the requesting State. The

(5) The Court also found that various factors could not justify a failure to comply with these obligations: the financial difficulties of a State;[414] referral of the matter to a regional organization;[415] or difficulties with implementation under the State's internal law.[416]

(6) The first sentence of draft article 10 recognizes that the State's obligation can be satisfied by extraditing or surrendering the alleged offender not just to a State, but also to an international criminal tribunal that is competent to prosecute the offender. This third option has arisen in conjunction with the establishment of the International Criminal Court and other international criminal tribunals.[417] While the term "extradition" is often associated with the sending of a person to a State and the term "surrender" is typically used for the sending of a person to a competent international criminal tribunal, draft article 10 is written so as not to limit the use of the terms in that way. The terminology used in national criminal systems and in international relations can vary[418] and, for that reason, the Commission considered that a more general formulation is preferable. Further, while draft article 10 might condition the reference to an international criminal tribunal so as to say that it must be a tribunal whose jurisdiction the sending State has recognized,[419] such a qualification was viewed as unnecessary.

(7) The second sentence of draft article 10 provides that, when a State submits the matter to prosecution, its "authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State". Most treaties containing the Hague formula include such a clause, the objective of which is to help ensure that the normal procedures and standards of evidence relating to serious offences are applied.

(8) The obligation upon a State to submit the case to the competent authorities may conflict with the ability of the State to implement an amnesty, meaning legal measures that have the effect of prospectively barring criminal prosecution of certain individuals (or categories of individuals) in respect of specified criminal conduct alleged to have been committed before the amnesty's adoption, or legal measures that retroactively nullify legal liability previously established.[420] An amnesty granted by a State in which crimes have occurred may arise pursuant to its constitutional, statutory, or other law, and might be the product of a peace agreement ending an armed conflict. Such an amnesty might be general in nature or might be conditioned by certain requirements, such as disarmament of a non-State actor group, a willingness of an alleged offender to testify in public to the crimes committed, or an expression of apology to the victims or their families by the alleged offender.

(9) With respect to prosecution before international criminal tribunals, the possibility of including a provision on amnesty was debated during the negotiation of the 1998 Rome Statute of the International Criminal Court, but no such provision was included. Nor was such a provision included in the statutes of the international criminal tribunals for the former Yugoslavia or Rwanda. The former, however, held that an amnesty adopted in national law in relation to the offence of torture "would not be accorded international legal

---

[414] *Ibid.* p. 460, para. 112.

[415] *Ibid.*

[416] *Ibid.*, para. 113.

[417] See *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), chap. VI, sect. C (final report on the topic), para. (35), pp. 155-156.

[418] See, for example, European Union, Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *Official Journal of the European Communities*, L 190, 18 July 2002, p. 1. Article 1 of the framework decision provides: "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and *surrender* by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order" (emphasis added).

[419] See International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 1.

[420] Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), HR/PUB/09/1, p. 5.

recognition".[421] The instruments establishing the Special Court for Sierra Leone[422] and the Extraordinary Chambers in the Courts of Cambodia[423] provided that an amnesty adopted in national law is not a bar to their respective jurisdictions. In addition, these courts recognized that there is a "crystallising international norm" [424] or "emerging consensus" [425] prohibiting amnesties in relation to serious international crimes, particularly in relation to blanket or general amnesties, based on a duty to investigate and prosecute those crimes and punish their perpetrators.

(10) With respect to prosecution before national courts, recently negotiated treaties addressing crimes in national law have not expressly precluded amnesties, including treaties addressing serious crimes. For example, the possibility of including a provision on amnesty was raised during the negotiation of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, but no such provision was included.[426] Regional human rights courts and bodies, including the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, however, have found amnesties to be impermissible or as not precluding accountability under regional human rights treaties.[427] Expert treaty bodies have interpreted their respective treaties as precluding a State party from passing, applying or not revoking amnesty laws.[428] Further, the position of the Secretariat of the United Nations is not to recognize or condone amnesties for genocide, war crimes, crimes against humanity

---

[421] See *Prosecutor v. Furundžija* (see footnote 271 above), para. 155.

[422] Statute of the Special Court for Sierra Leone, art. 10 ("An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution").

[423] Extraordinary Chambers of Cambodia Agreement, art. 40 ("The Royal Government of Cambodia shall not request an amnesty or pardon for any persons who may be investigated for or convicted of crimes referred to in Articles 3, 4, 5, 6, 7 and 8 of this law. The scope of any amnesty or pardon that may have been granted prior to the enactment of this Law is a matter to be decided by the Extraordinary Chambers").

[424] See *Prosecutor v. Kallon and Kamara*, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), 13 March 2004, paras. 66-74 and 82-84.

[425] See *Decision on Ieng Sary's Rule 89 Preliminary Objections (Ne Bis In Idem and Amnesty and Pardon)*, Case No. 002/19-09-2007/ECCC/TC, Judgment of 3 November 2011, Extraordinary Chambers in the Courts of Cambodia, Trial Chamber, paras. 40-53.

[426] Report of the inter-sessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance (E/CN.4/2004/59), paras. 73-80.

[427] See, for example, *Barrios Altos v. Peru*, Judgment of 14 March 2001, Inter-American Court of Human Rights, Series C, No. 75, paras. 41-44; *Almonacid Arellano et al. v. Chile*, Judgment of 26 September 2006, Inter-American Court of Human Rights, Series C, No. 154, para. 114; *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/02, Decision of 15 May 2006, African Commission on Human and Peoples' Rights, paras. 211-212. The European Court of Human Rights has taken a more cautious approach, recognizing the "growing tendency in international law" to regard amnesties for grave breaches of fundamental human rights as unacceptable, as they are incompatible with the unanimously recognized obligation of States to prosecute and punish such crimes. See *Marguš v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, European Court of Human Rights, Grand Chamber, para. 139.

[428] See, for example, Human Rights Committee, general comment No. 20, para. 15; Human Rights Committee, general comment No. 31, para. 18; Human Rights Committee, *Hugo Rodríguez v. Uruguay*, communication No. 322/1988, Views adopted on 19 July 1994, para. 12.4. The Committee against Torture has held that amnesties against torture are incompatible with the obligations of States parties under the Convention against Torture. See, for example, general comment No. 3 (2012) on the implementation of article 14, in *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44* (A/68/44), annex X, para. 41. The Committee on the Elimination of Discrimination against Women has also recommended that States parties ensure that substantive aspects of transitional justice mechanisms guarantee women's access to justice by, *inter alia*, rejecting amnesties for gender-based violence. Committee on the Elimination of Discrimination against Women, general recommendation No. 30 (2013) on women in conflict prevention, conflict and post-conflict situations, *ibid., Sixty-ninth Session, Supplement No. 38* (A/69/38), chap. VII, para. 44, and CEDAW/C/GC/30, para. 81 (b).

or gross violations of human rights for United Nations-endorsed peace agreements.[429] Since the entry into force of the 1998 Rome Statute, several States have adopted national laws that prohibited amnesties and similar measures with respect to crimes against humanity.[430]

(11) With respect to the present draft articles, it is noted that an amnesty adopted by one State would not bar prosecution by another State with concurrent jurisdiction over the offence.[431] Within the State that has adopted the amnesty, its permissibility would need to be evaluated, *inter alia*, in the light of that State's obligations under the present draft articles to criminalize crimes against humanity, to comply with its *aut dedere aut judicare* obligation, and to fulfil its obligations in relation to victims and others.

Article 11
Fair treatment of the alleged offender

1. Any person against whom measures are being taken in connection with an offence covered by the present draft articles shall be guaranteed at all stages of the proceedings fair treatment, including a fair trial, and full protection of his or her rights under applicable national and international law, including human rights law.

2. Any such person who is in prison, custody or detention in a State that is not of his or her nationality shall be entitled:

(a) to communicate without delay with the nearest appropriate representative of the State or States of which such person is a national or which is otherwise entitled to protect that person's rights or, if such person is a stateless person, of the State which, at that person's request, is willing to protect that person's rights;

(b) to be visited by a representative of that State or those States; and

(c) to be informed without delay of his or her rights under this paragraph.

---

[429] See, for example, Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (23 August 2004), document S/2004/616, paras. 10, 32 and 64 (c). This practice was first manifested when the Special Representative of the Secretary-General of the United Nations attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that "the amnesty provision contained in article IX of the Agreement ('absolute and free pardon') shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law". Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, document S/2000/915, para. 23. For additional views, see Office of the United Nations High Commissioner for Human Rights, *Rule of Law Tools for Post-Conflict States: Amnesties* (2009), HR/PUB/09/1, p. 11 ("Under various sources of international law and under United Nations policy, amnesties are impermissible if they: (a) Prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity or gross violations of human rights, including gender-specific violations; (b) Interfere with victims' right to an effective remedy, including reparation; or (c) Restrict victims' and societies' right to know the truth about violations of human rights and humanitarian law. Moreover, amnesties that seek to restore human rights must be designed with a view to ensuring that they do not restrict the rights restored or in some respects perpetuate the original violations".); Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, document A/56/156, para. 33.

[430] See, for example, Argentina, Ley 27.156, 31 July 2015, art. 1; Burkina Faso, Loi 052/2009 portant détermination des compétences et de la procédure de mise en œuvre du Statut de Rome relatif à la Cour pénale internationale par les juridictions burkinabé, art. 14; Burundi, Loi n°1/05 du 22 avril 2009, Code pénal du Burundi, art. 171; Central African Republic, Loi No. 08-020 portant amnistie générale à l'endroit des personnalités, des militaires, des éléments et responsables civils des groupes rebelles, 13 October 2008, art. 2; Colombia, Acuerdo de Paz, 24 November 2016, art. 40; Comoros, Loi 011-022 du 13 décembre 2011, portant de Mise en œuvre du Statut de Rome, art. 14; Democratic Republic of Congo, Loi n°014/006 du 11 février 2014 portant amnistie pour faits insurrectionnels, faits de guerre et infractions politiques, art. 4; Panama, Código Penal de Panamá, art. 115, para. 3; Uruguay, Ley 18.026, 4 October 2006, art. 8.

[431] See, for example, *Ould Dah v. France*, Application No. 13113/03, Decision on admissibility of 17 March 2009, European Court of Human Rights, Fifth Section, ECHR 2009, para. 49.

> 3. The rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purpose for which the rights accorded under paragraph 2 are intended.

Commentary

(1) Draft article 11 is focused on the obligation of the State to accord to an alleged offender who is present in territory under the State's jurisdiction fair treatment, including a fair trial and full protection of his or her rights. Moreover, draft article 11 acknowledges the right of an alleged offender, who is not of the State's nationality but who is in prison, custody or detention, to have access to a representative of his or her State.

(2) All States provide within their national law for protections of one degree or another for persons who they investigate, detain, try or punish for a criminal offence. Such protections may be specified in a constitution, statute, administrative rule or judicial precedent. Further, detailed rules may be codified or a broad standard may be set referring to "fair treatment", "due process", "judicial guarantees" or "equal protection". Such protections are extremely important in ensuring that the extraordinary power of the State's criminal justice apparatus is not improperly brought to bear upon a suspect, among other things preserving for that individual the ability to contest fully the State's allegations before an independent court (hence, allowing for an "equality of arms").

(3) Important protections are also now well recognized in international criminal law and human rights law. At the most general level such protections are acknowledged in articles 10 and 11 of the 1948 Universal Declaration of Human Rights,[432] while more specific standards binding upon States are set forth in article 14 of the 1966 International Covenant on Civil and Political Rights. As a general matter, instruments establishing standards for an international court or tribunal seek to specify the standards set forth in article 14 of the Covenant, while treaties addressing national law provide a broad standard that is intended to acknowledge and incorporate the specific standards of article 14 and of other relevant instruments "at all stages" of the national proceedings involving the alleged offender.[433]

(4) These treaties addressing national law do not define the term "fair treatment", but the term is viewed as incorporating the specific rights possessed by an alleged offender, such as those under article 14 of the 1966 International Covenant on Civil and Political Rights. Thus, when crafting article 8 of the draft articles on crimes against diplomatic agents, the Commission asserted that the formulation of "fair treatment at all stages of the proceedings" was "intended to incorporate all the guarantees generally recognized to a detained or accused person", and that an "example of such guarantees is found in article 14

---

[432] Universal Declaration of Human Rights, General Assembly resolution 217 A (III) of 10 December 1948, arts. 10-11.

[433] See, for example, Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 9; International Convention against the Taking of Hostages, art. 8, para. 2; Convention against Torture, art. 7, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201, art. 10, para. 2; Convention on the Rights of the Child, art. 40, para. 2 (b); International Convention against the Recruitment, Use, Financing and Training of Mercenaries (New York, 4 December 1989), *ibid.*, vol. 2163, No. 37789, p. 75, art. 11; International Convention for the Suppression of Terrorist Bombings, art. 14; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 26 March 1999), United Nations, *Treaty Series*, vol. 2253, No. 3511, art. 17, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 17; United Nations Convention against Transnational Organized Crime, art. 16, para. 13; United Nations Convention against Corruption, art. 44, para. 14; International Convention for the Suppression of Acts of Nuclear Terrorism, art. 12 (New York, 13 April 2005), United Nations, *Treaty Series*, vol. 2445, No. 44004, p. 89; International Convention for the Protection of All Persons from Enforced Disappearance, art. 11, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. 8, para. 1.

of the International Covenant on Civil and Political Rights".[434] Further, the Commission noted that the "expression 'fair treatment' was preferred, because of its generality, to more usual expressions such as 'due process', 'fair hearing' or 'fair trial' which might be interpreted in a narrow technical sense".[435] Finally, the Commission also explained that the formulation of "all stages of the proceedings" is "intended to safeguard the rights of the alleged offender from the moment he is found and measures are taken to ensure his presence until a final decision is taken on the case".[436]

(5) While the term "fair treatment" includes the concept of a "fair trial", in many treaties reference to a fair trial is expressly included to stress its particular importance. Indeed, the Human Rights Committee has found the right to a fair trial to be a "key element of human rights protection" and a "procedural means to safeguard the rule of law".[437] Consequently, draft article 11, paragraph 1, refers to fair treatment "including a fair trial".

(6) In addition to fair treatment, an alleged offender is also entitled to the highest protection of his or her rights, whether arising under applicable national or international law, including human rights law. Such rights are set forth in the constitutions, statutes or other rules within the national legal systems of States. At the international level, they are set out in global human rights treaties, in regional human rights treaties[438] or in other applicable instruments.[439] Consequently, draft article 11, paragraph 1, also recognizes that the State must provide full protection of the offender's "rights under applicable national and international law, including human rights law".

(7) Paragraph 2 of draft article 11 addresses the State's obligations with respect to an alleged offender who is not of the State's nationality and who is in "prison, custody or detention". That term is to be understood as embracing all situations where the State restricts the person's ability to communicate freely with and be visited by a representative of his or her State of nationality. In such situations, the State in the territory under whose jurisdiction the alleged offender is present is required to allow the alleged offender to communicate, without delay, with the nearest appropriate representative of the State or States of which such a person is a national, or the State or States otherwise entitled to protect that person's rights. Further, the alleged offender is entitled to be visited by a representative of that State or those States. Finally, the alleged offender is entitled to be informed without delay of these rights. Moreover, paragraph 2 applies these rights as well to a stateless person, requiring that such person be entitled to communicate without delay with the nearest appropriate representative of the State which, at that person's request, is willing to protect that person's rights and to be visited by that representative.

(8) Such rights are spelled out in greater detail in article 36, paragraph 1, of the 1963 Vienna Convention on Consular Relations,[440] which accords rights to both the detained person and to the State of nationality[441] and in customary international law. Recent treaties

---

[434] *Yearbook … 1972*, vol. II, document A/8710/Rev.1, chap. III, sect. B (Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons), commentary to art. 8, p. 320.

[435] *Ibid.*

[436] *Ibid.*

[437] Human Rights Committee, general comment No. 32 (2007) on article 14, Right to equality before courts and tribunals and to a fair trial, para. 2 and 18-28, *Official Records of the General Assembly, Sixty-second session, Supplement No. 40* (A/62/40), annex VI.

[438] See, for example, American Convention on Human Rights, art. 8; African Charter on Human and Peoples' Rights, art. 7; European Convention on Human Rights, art. 6.

[439] See, for example, Universal Declaration of Human Rights; American Declaration of the Rights and Duties of Man (Bogota, 2 May 1948), adopted by the Ninth International Conference of American States; Cairo Declaration on Human Rights in Islam, Organisation of Islamic Cooperation Resolution No. 49/19-P, annex; Charter of the Fundamental Rights of the European Union, adopted in Nice on 7 December 2000, *Official Journal of the European Communities*, No. C 364, 18 December 2000, p. 1.

[440] Vienna Convention on Consular Relations (Vienna, 24 April 1963), United Nations, *Treaty Series*, vol. 596, No. 8638, p. 261, art. 36, para. 1.

[441] *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 466, at p. 492, para. 74 ("Article 36, paragraph 1, establishes an interrelated régime designed to facilitate the

addressing crimes typically do not seek to go into such detail but, like draft article 11, paragraph 2, instead simply reiterate that the alleged offender is entitled to communicate with, and be visited by, his or her State of nationality (or, if a stateless person, with the State where he or she usually resides or that is otherwise willing to protect that person's rights).[442]

(9) Paragraph 3 of draft article 11 provides that the rights referred to in paragraph 2 shall be exercised in conformity with the laws and regulations of the State in the territory under whose jurisdiction the person is present, provided that such laws and regulations do not prevent such rights being given the full effect for which they are intended. Those national laws and regulations may relate, for example, to the ability of an investigating magistrate to impose restrictions on communication for the protection of victims or witnesses, as well as standard conditions with respect to visitation of a person being held at a detention facility. A comparable provision exists in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations[443] and has been included as well in many treaties addressing crimes.[444] The Commission explained the provision in its commentary to what became the 1963 Vienna Convention as follows:

> "(5) All the above-mentioned rights are exercised in conformity with the laws and regulations of the receiving State. Thus, visits to persons in custody or imprisoned are permissible in conformity with the provisions of the code of criminal procedure and prison regulations. As a general rule, for the purpose of visits to a person in custody against whom a criminal investigation or a criminal trial is in process, codes of criminal procedure require the permission of the examining magistrate, who will decide in the light of the requirements of the investigation. In such a case, the consular official must apply to the examining magistrate for permission. In the case of a person imprisoned in pursuance of a judgement, the prison regulations governing visits to inmates apply also to any visits which the consular official may wish to make to a prisoner who is a national of the sending State.
>
> …
>
> (7) Although the rights provided for in this article must be exercised in conformity with the laws and regulations of the receiving State, this does not mean that these laws and regulations can nullify the rights in question."[445]

(10) In the *LaGrand* case, the International Court of Justice found that the reference to "rights" in article 36, paragraph 2, of the 1963 Vienna Convention on Consular Relations "must be read as applying not only to the rights of the sending State, but also to the rights of the detained individual".[446]

---

implementation of the system of consular protection"), and, at p. 494, para. 77 ("Based on the text of these provisions, the Court concludes that Article 36, paragraph 1, creates individual rights").

[442] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6, para. 3; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 6, para. 2; International Convention against the Taking of Hostages, art. 6, para. 3; Convention against Torture, art. 6, para. 3; Convention on the Safety of United Nations and Associated Personnel, art. 17, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 3; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 3; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 10, para. 3; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 4.

[443] Vienna Convention on Consular Relations, art. 36, para. 2.

[444] See, for example, International Convention against the Taking of Hostages, art. 4; International Convention for the Suppression of Terrorist Bombings, art. 7, para. 4; International Convention for the Suppression of the Financing of Terrorism, art. 9, para. 4; OAU Convention on the Prevention and Combating of Terrorism, art. 7, para. 4; Association of Southeast Asian Nations Convention on Counter Terrorism, art. VIII, para. 5.

[445] *Yearbook … 1961*, vol. II, document A/4843, draft articles on consular relations and commentary, commentary to article 36, paras. (5) and (7).

[446] *LaGrand* (see footnote 441 above), p. 497, para. 89.

Article 12
Victims, witnesses and others

1. Each State shall take the necessary measures to ensure that:

(a) any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities; and

(b) complainants, victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles, shall be protected against ill-treatment or intimidation as a consequence of any complaint, information, testimony or other evidence given. Protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.

2. Each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings against alleged offenders in a manner not prejudicial to the rights referred to in draft article 11.

3. Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition.

Commentary

(1) Draft article 12 addresses the rights of victims, witnesses and other persons affected by the commission of a crime against humanity.

(2) Many treaties addressing crimes under national law prior to the 1980s did not contain provisions with respect to victims or witnesses[447] and, even after the 1980s, most global treaties concerned with terrorism did not address the rights of victims and witnesses.[448] Since the 1980s, however, many treaties concerning crimes have included provisions similar to those appearing in draft article 12,[449] including treaties addressing acts that may constitute crimes against humanity in certain circumstances, such as torture and enforced disappearance.[450] Some of the statutes of international courts and tribunals that have jurisdiction over crimes against humanity, notably the 1998 Rome Statute of the

---

[447] See, for example, Genocide Convention; Convention for the Suppression of Unlawful Seizure of Aircraft, United Nations, *Treaty Series*, vol. 860, No. 12325 (The Hague, 16 December 1970), p. 105; International Convention on the Suppression and Punishment of the Crime of Apartheid, United Nations, *Treaty Series*, vol. 1015, No. 14861 (New York, 30 November 1973), p. 243; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (New York, 14 December 1973), United Nations, *Treaty Series*, vol. 1035, No. 15410, p. 167; International Convention against the Taking of Hostages, United Nations, *Treaty Series*, vol. 1316, No. 21931, p. 205 (New York, 17 December 1979).

[448] See, for example, International Convention for the Suppression of Terrorist Bombings (New York, 15 December 1997), United Nations, *Treaty Series*, vol. 2149, No. 37517, p. 256; Organization of African Unity (OAU) Convention on the Prevention and Combating of Terrorism (Algiers, 14 July 1999), United Nations, *Treaty Series*, vol. 2219, No. 39464, p. 179; International Convention for the Suppression of Acts of Nuclear Terrorism; Association of Southeast Asian Nations Convention on Counter Terrorism.

[449] See, for example, United Nations Convention against Transnational Organized Crime, arts. 24-25; United Nations Convention against Corruption, arts. 32-33.

[450] See, for example, Convention against Torture, arts. 13-14; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 12 and 24.

International Criminal Court,[451] have addressed the rights of victims and witnesses, and the General Assembly of the United Nations has provided guidance for States with respect to the rights of victims of crimes, including victims of crimes against humanity.[452]

(3) Most treaties that address the rights of victims within national law do not define the term "victims",[453] allowing States instead to apply their existing law and practice.[454] At the same time, practice associated with those treaties and under customary international law provides guidance as to how the term may be viewed. For example, while the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment does not define what is meant in article 14 by "victim", the Committee against Torture has provided detailed guidance as to its meaning.[455] At the regional level, the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms allows applications to be filed by "any person, non-governmental organisation or group of individuals" claiming to be a "victim" of a violation of the Convention.[456] The European Court of Human Rights has found that such "victims" may be harmed either directly or indirectly,[457] and that family members of a victim of a serious human rights violation may themselves be "victims".[458] While the guarantees contained in the 1969 American

---

[451] See, for example, Rome Statute, art. 68; Rules of Procedure and Evidence of the International Criminal Court, in *Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, 3-10 September 2002* (ICC-ASP/1/3 and Corr.1), chap. 4, section III.1, rule 86 (hereinafter "Rules of Procedure and Evidence of the International Criminal Court"). For other tribunals, see Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Extraordinary Chambers of Cambodia Agreement, art. 33; Statute of the Special Court of Sierra Leone, art. 16; Statute of the Special Tribunal for Lebanon, art. 12.

[452] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985, annex; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147 of 16 December 2005, annex.

[453] Exceptions include: International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 1 ("For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance".); Convention on Cluster Munitions (Dublin, 1 August 2010), United Nations, *Treaty Series*, vol. 2688, No. 47713, p. 39, art. 2, para. 1 ("'Cluster munition victims' means all persons who have been killed or suffered physical or psychological injury, economic loss, social marginalization or substantial impairment of the realization of their rights caused by the use of cluster munitions. They include those persons directly impacted by cluster munitions as well as their affected families and communities").

[454] See, for example, the General Victims' Law of Mexico (*Ley General de Víctimas, Diario Oficial de la Federación el 9 de enero de 2013*), which has detailed provisions on the rights of victims, but does not contain restrictions on who may claim to be a victim.

[455] Committee against Torture, general comment No. 3, para. 3 ("Victims are persons who have individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute violations of the Convention. A person should be considered a victim regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted, and regardless of any familial or other relationship between the perpetrator and the victim. The term 'victim' also includes affected immediate family or dependants of the victim as well as persons who have suffered harm in intervening to assist victims or to prevent victimization").

[456] European Convention on Human Rights, art. 34.

[457] See, for example, *Vallianatos and Others v. Greece*, Application Nos. 29381/09 and 32684/09, Judgment of 7 November 2013, Grand Chamber, European Court of Human Rights, ECHR 2013 (extracts), para. 47.

[458] The European Court of Human Rights has stressed that whether a family member is a victim depends on the existence of special factors that gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements include the closeness of the familial bond and the way the authorities responded to the relative's enquiries. See, for example, *Çakici v. Turkey*, Application No. 23657/94, Judgment of 8 July 1999, Grand Chamber, European Court of

Convention on Human Rights are restricted to natural persons,[459] the Inter-American Court of Human Rights has also recognized both direct and indirect individual victims, including family members,[460] as well as victim groups.[461] Under such treaties, the term "victim" is not construed narrowly or in a discriminatory manner.

(4) Likewise, while the statutes of international criminal tribunals do not define the term "victim", guidance may exist in the rules or jurisprudence of the tribunals. Thus, rule 85 (a) of the Rules of Procedure and Evidence of the International Criminal Court defines "victims" as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court",[462] which is understood as including both direct and indirect victims,[463] while rule 85 (b) extends the definition to legal persons provided such persons have suffered direct harm.[464]

(5) Draft article 12, paragraph 1, provides that each State shall take the necessary measures to ensure that any person who alleges that acts constituting crimes against humanity have been or are being committed has the right to complain to the competent authorities, and further obliges States to protect from ill-treatment or intimidation those who complain or otherwise participate in proceedings within the scope of the draft articles. A similar provision is included in other international treaties, including the 1984

Human Rights, ECHR 1999-IV, para. 98; *Elberte v. Latvia*, Application No. 61243/08, Judgment of 13 January 2015, Fourth Section, European Court of Human Rights, ECHR 2015, para. 137.

[459] American Convention on Human Rights, art. 1.

[460] See, for example, *Street Children (Villagrán-Morales et al.) v. Guatemala*, Judgment of 19 November 1999 (Merits), Inter-American Court of Human Rights, Series C, No. 63, paras. 174-177 and 238; *Bámaca-Velásquez v. Guatemala*, Judgment of 25 November 2000 (Merits), Inter-American Court of Human Rights, Series C, No. 70, paras. 159-166.

[461] See, for example, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005 (Merits, Reparations and Costs), Inter-American Court of Human Rights, Series C, No. 125, para. 176.

[462] Rules of Procedure and Evidence of the International Criminal Court, rule 85 (a). The Court has found that rule 85 (a) "establishes four criteria that have to be met in order to obtain the status of victim: the victim must be a natural person; he or she must have suffered harm; the crime from which the harm ensued must fall within the jurisdiction of the Court; and there must be a causal link between the crime and the harm suffered". See *Situation in the Democratic Republic of Congo*, Case No. ICC-01/04, public redacted version of decision on the application for participation in the proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, 17 January 2006, Pre-Trial Chamber I, International Criminal Court, para. 79. Further, the harm suffered by a victim for the purposes of rule 85 (a) must be "personal" harm, though it does not necessarily have to be "direct" harm. See *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06 OA 9 OA 10, Judgment on the appeals of the Prosecutor and the Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008, 11 July 2008, Appeals Chamber, International Criminal Court, paras. 32-39.

[463] See *Situation in the Democratic Republic of Congo in the case of the Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, redacted version of decision on indirect victims, 8 April 2009, Trial Chamber I, International Criminal Court, paras. 44-52.

[464] Rules of Procedure and Evidence of the International Criminal Court, rule 85 (b) ("Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes"). The 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of the General Assembly provide: "For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, para. 8. For a similar definition, see Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, paras. 1-2.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[465] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[466]

(6) Subparagraph (a) of paragraph 1 extends the right to complain to "any person" who alleges that acts constituting crimes against humanity have been or are being committed. The term "any person" includes but is not limited to a victim or witness of a crime against humanity, and may include legal persons such as religious bodies or non-governmental organizations.

(7) Such persons have a right to complain to "competent authorities", which, to be effective, in some circumstances may need to be judicial authorities. Following a complaint, State authorities have a duty to proceed to a prompt and impartial investigation whenever there are reasonable grounds to believe that acts constituting crimes against humanity have been or are being committed in any territory under the State's jurisdiction, in accordance with draft article 8.

(8) Subparagraph (b) of paragraph 1 obliges States to protect "complainants" as well as the other categories of persons listed even if they did not file a complaint; those other categories are "victims, witnesses, and their relatives and representatives, as well as other persons participating in any investigation, prosecution, extradition or other proceeding within the scope of the present draft articles". Recent international treaties have similarly expanded the category of persons to whom protection shall be granted, including the 2000 United Nations Convention against Transnational Organized Crime,[467] the 2003 United Nations Convention against Corruption,[468] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[469] Protective measures for these persons are required not just under treaties addressing crimes in national law, but also in the statutes of international criminal tribunals.[470]

(9) Subparagraph (b) of paragraph 1 requires that the listed persons be protected from "ill-treatment and intimidation" as a consequence of any complaint, information, testimony or other evidence given. The term "ill-treatment" relates not just to the person's physical well-being, but also includes the person's psychological well-being, dignity or privacy.[471]

(10) Subparagraph (b) does not provide a list of protective measures to be taken by States, as the measures will inevitably vary according to the circumstances at issue, the capabilities of the relevant State, and the preferences of the persons concerned. Such measures, however, might include: the presentation of evidence by electronic or other special means rather than in person;[472] measures designed to protect the privacy and identity of witnesses and victims;[473] *in camera* proceedings;[474] withholding evidence or information

---

[465] Convention against Torture, art. 13.

[466] International Convention for the Protection of All Persons from Enforced Disappearance, art. 12.

[467] United Nations Convention against Transnational Organized Crime, art. 24, para. 1.

[468] United Nations Convention against Corruption, art. 32, para. 1.

[469] International Convention for the Protection of All Persons from Enforced Disappearance, art. 12, para. 1.

[470] See, for example, Rome Statute, art. 68, para. 1; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 22; Statute of the International Criminal Tribunal for Rwanda, art. 21; Extraordinary Chambers of Cambodia Agreement, art. 33; Statute of the Special Court of Sierra Leone, art. 16; Statute of the Special Tribunal for Lebanon, art. 12.

[471] See, for example, Rome Statute, art. 68, para. 1.

[472] See, for example, Rome Statute, art. 68, para. 2; United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (b); United Nations Convention against Corruption, art. 32, para. 2 (b).

[473] See, for example, Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 1 (e); Extraordinary Chambers of Cambodia Agreement, art. 33.

[474] See, for example, Rome Statute, art. 68, para. 2; Extraordinary Chambers of Cambodia Agreement, art. 33.

if disclosure may lead to the grave endangerment of the security of a witness or his or her family;[475] and the relocation of victims and witnesses.[476]

(11) At the same time, States must be mindful that some protective measures may have implications with respect to the rights of an alleged offender, such as the right to confront witnesses against him or her. As a result, subparagraph (b) of paragraph 1 stipulates that protective measures shall be without prejudice to the rights of the alleged offender referred to in draft article 11.[477]

(12) Draft article 12, paragraph 2, provides that each State shall, in accordance with its national law, enable the views and concerns of victims of a crime against humanity to be presented and considered at appropriate stages of criminal proceedings. While expressing a firm obligation, the clause "in accordance with its national law" provides flexibility to the State as to implementation of the obligation, allowing States to tailor the requirement to the unique characteristics of its criminal law system. Although addressed only to "victims", it may also be appropriate for States to permit others (such as family members or representatives) to present their views and concerns, especially in circumstances where a victim of a crime against humanity has died or disappeared. Paragraph 2 is without prejudice to other obligations of States that exist under international law.

(13) Examples of a provision such as paragraph 2 may be found in various treaties, such as: the 1998 Rome Statute of the International Criminal Court;[478] the 2000 Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography;[479] the 2000 United Nations Convention against Transnational Organized Crime;[480] the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime;[481] and the 2003 United Nations Convention against Corruption.[482]

(14) Draft article 12, paragraph 3, addresses the right of a victim of a crime against humanity to obtain reparation. The opening clause — "Each State shall take the necessary measures to ensure in its legal system" — obliges States to have or enact necessary laws, regulations, procedures or mechanisms to enable victims to pursue claims against and secure redress for the harm they have suffered from those who are responsible for the harm, be it the State itself or some other actor.[483]

(15) Paragraph 3 refers to the victim's "right to obtain reparation". Treaties and instruments addressing this issue have used different terminology, sometimes referring to the right to a "remedy" or "redress", sometimes using the term "reparation", and sometimes referring only to a specific form of reparation, such as "compensation".[484] Thus, the right to

---

[475] See, for example, Rome Statute, art. 68, para. 5.

[476] See, for example, United Nations Convention against Transnational Organized Crime, art. 24, para. 2 (a); United Nations Convention against Corruption, art. 32, para. 2 (a).

[477] Other relevant international treaties provide a similar protection, including the Rome Statute, art. 68, para. 1; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8, para. 6; United Nations Convention against Transnational Organized Crime, art. 24, para. 2; United Nations Convention against Corruption, art. 32, para. 2.

[478] Rome Statute, art. 68, para. 3.

[479] Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 8.

[480] United Nations Convention against Transnational Organized Crime, art. 25, para. 3.

[481] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 2.

[482] United Nations Convention against Corruption, art. 32, para. 5.

[483] Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, principles 12 to 23.

[484] See, for example, International Convention for the Suppression of the Financing of Terrorism, art. 8, para. 4; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, art. 9, para. 4; United Nations Convention against Transnational Organized Crime, arts. 14, para. 2, and 25, para. 2; Protocol to Prevent, Suppress and Punish

an "effective remedy" may be found in the 1948 Universal Declaration of Human Rights,[485] the 1966 International Covenant on Civil and Political Rights,[486] and in some regional human rights treaties.[487] The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in article 14, refers to the victim's ability to obtain "redress" and to a right to "compensation" including "rehabilitation".[488] The 2006 International Convention for the Protection of All Persons from Enforced Disappearance, in article 24, refers to a "right to obtain reparation and prompt, fair and adequate compensation".[489]

(16) The Commission decided to refer to a "right to obtain reparation" as a means of capturing redress in a comprehensive sense, an approach that appears to have taken root in various treaty regimes. Thus, while the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment quoted above refers to the terms "redress", "compensation" and "rehabilitation", the Committee against Torture considers that the provision as a whole embodies a "comprehensive reparative concept",[490] according to which:

> The obligations of States parties to provide redress under article 14 are two-fold: procedural and substantive. To satisfy their procedural obligations, States parties shall enact legislation and establish complaints mechanisms, investigation bodies and institutions, including independent judicial bodies, capable of determining the right to and awarding redress for a victim of torture and ill-treatment, and ensure that such mechanisms and bodies are effective and accessible to all victims. At the substantive level, States parties shall ensure that victims of torture or ill-treatment obtain full and effective redress and reparation, including compensation and the means for as full rehabilitation as possible.[491]

(17) This movement towards a more comprehensive concept of reparation has led to some treaty provisions that list various forms of reparation. For example, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance indicates that the "right to obtain reparation", which covers "material and moral damages" may consist of not just compensation, but also, "where appropriate, other forms of reparation such as: (a) Restitution; (b) Rehabilitation; (c) Satisfaction, including restoration of dignity and reputation; (d) Guarantees of non-repetition".[492]

(18) Draft article 12, paragraph 3, follows this approach by setting forth a list of forms of reparation, which include, but are not limited to, restitution, compensation, satisfaction, rehabilitation, cessation and guarantees of non-repetition. In the context of crimes against humanity, all traditional forms of reparation are potentially relevant. Restitution, or the

---

Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 6, para. 6; United Nations Convention against Corruption, art. 35.

[485] Universal Declaration of Human Rights, art. 8.

[486] International Covenant on Civil and Political Rights, art. 2, para. 3. See also Human Rights Committee, general comment No. 31, paras. 16-17.

[487] See, for example, European Convention on Human Rights, art. 13; American Convention on Human Rights, arts. 25 and 63. See also Organization of African Unity, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Ouagadougou, 10 June 1998), Office of the United Nations High Commissioner for Refugees (UNHCR), *Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR*, vol. 3, *Regional Instruments, Africa, Middle East, Asia, Americas*, Geneva, UNHCR, 2007, p. 1040, at p. 1045, art. 27.

[488] Convention against Torture, art. 14, para. 1.

[489] International Convention for the Protection of All Persons from Enforced Disappearance, art. 24, para. 4.

[490] Committee against Torture, general comment No. 3, para. 2; *Urra Guridi v. Spain*, communication No. 212/2002, decision adopted on 24 May 2005, para. 6.8, *Official Records of the General Assembly, Sixtieth Session, Supplement No. 44* (A/60/44), annex VIII, sect. A, p. 147.

[491] Committee against Torture, general comment No. 3, para. 5.

[492] International Convention for the Protection of All Persons from Enforced Disappearance, arts. 24, paras. 4-5.

process also may arise where an offender has escaped from lawful custody following conviction in the requesting State and is found in the requested State. Often extradition between two States is regulated by a multilateral[497] or bilateral treaty, [498] although not all States require the existence of a treaty for an extradition to occur.

(2) In 1973, the General Assembly of the United Nations in resolution 3074 (XXVIII) highlighted the importance of international cooperation in the extradition of persons who have allegedly committed crimes against humanity, where necessary to ensure their prosecution and punishment.[499] In 2001, the Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights reaffirmed the principles set forth in General Assembly resolution 3074 (XXVIII)[500] and urged "all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity".[501]

(3) Draft article 13 should be considered in the overall context of the present draft articles. Draft article 7, paragraph 2, provides that each State shall take the necessary measures to establish its jurisdiction over the offences covered by the present draft articles in cases where the alleged offender is present in any territory under its jurisdiction, and the State does not extradite or surrender the person. When an alleged offender is present and has been taken into custody, the State is obliged under draft article 9, paragraph 3, to notify other States that have jurisdiction to prosecute the alleged offender, which may result in those States seeking the alleged offender's extradition. Further, draft article 10 obligates the State to submit the case to its competent authorities for prosecution, unless the State extradites or surrenders the person to another State or competent international criminal tribunal.

(4) Thus, under the present draft articles, a State may satisfy the *aut dedere aut judicare* obligation set forth in draft article 10 by extraditing (or surrendering) the alleged offender to another State for prosecution. There is no obligation to extradite the alleged offender; the primary obligation is for the State in the territory under whose jurisdiction the alleged offender is present to submit the case to its competent authorities for the purpose of prosecution. Yet that obligation may be satisfied, in the alternative, by extraditing the alleged offender to another State. To facilitate such extradition, it is useful to have in place clearly stated rights, obligations and procedures with respect to the extradition process.

(5) The Commission decided to model draft article 13 on article 44 of the 2003 United Nations Convention against Corruption, which in turn was modelled on article 16 of the 2000 United Nations Convention against Transnational Organized Crime. Although a crime against humanity by its nature is quite different from a crime of corruption, the issues arising in the context of extradition are largely the same regardless of the nature of the underlying crime, and the Commission was of the view that article 44 provides ample guidance as to all relevant rights, obligations and procedures for extradition in the context of crimes against humanity. Moreover, the provisions of article 44 are well understood by

---

[497] See, for example, European Convention on Extradition (Paris, 13 December 1957), United Nations, *Treaty Series*, vol. 359, No. 5146, p. 273; Inter-American Convention on Extradition (Caracas, 25 February 1981), United Nations, Treaty Series, vol. 1752, No. 30597, p. 177. See also Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (Luxembourg, 2002), *Official Journal of the European Communities*, No. L 190, vol. 45 (18 July 2002), p. 1.

[498] The 1990 Model Treaty on Extradition is one effort to help States in developing bilateral extradition agreements capable of addressing a wide range of crimes. See General Assembly resolution 45/116 of 14 December 1990, annex (subsequently amended by General Assembly resolution 52/88 of 12 December 1997).

[499] General Assembly resolution 3074 (XXVIII) of 3 December 1973.

[500] International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, resolution 2001/22 of 16 August 2001, para. 3, in report of the Sub-Commission on the Promotion and Protection of Human Rights on its fifty-third session (E/CN.4/2002/2-E/CN.4/Sub.2/2001/40). The Sub-Commission largely replicated in its resolution the principles of the General Assembly, but with some modifications.

[501] *Ibid.*, para. 2.

the 181 States parties to the 2003 United Nations Convention against Corruption, especially through the detailed guides and other resources developed by the United Nations Office on Drugs and Crime.[502]

Inclusion as an extraditable offence in existing and future extradition treaties

(6) Draft article 13, paragraph 1, is modelled on article 44, paragraph 4, of the 2003 United Nations Convention against Corruption. It obligates a requested State to regard the offences identified in the present draft articles as extraditable offences in any existing extradition treaty between it and the requesting State, as well as any such treaties concluded by those States in the future.[503] This provision is commonly included in other conventions.[504]

Exclusion of the "political offence" exception to extradition

(7) Paragraph 2 of draft article 13 excludes the "political offence" exception as a ground for not proceeding with an extradition process.

(8) Under some extradition treaties, the requested State may decline to extradite if it regards the offence for which extradition is requested as political in nature. Yet there is support for the proposition that crimes such as genocide, crimes against humanity and war crimes should not be regarded as "political offences". For example, article VII of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide provides that genocide and other enumerated acts "shall not be considered as political crimes for the purpose of extradition".[505] There are similar reasons not to regard alleged crimes against humanity as a "political offences" so as to preclude extradition.[506] The *Revised Manual on*

---

[502] See, for example, United Nations Office on Drugs and Crime, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*; *Technical Guide to the United Nations Convention against Corruption* (New York, United Nations, 2009); and Travaux préparatoires *of the Negotiations for the Elaboration of the United Nations Convention against Corruption*. The United Nations Office on Drugs and Crime has developed similar resources for the United Nations Convention against Transnational Organized Crime, which contains many of the same provisions as the United Nations Convention against Corruption in its article on extradition. See, for example, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2); see also report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions, addendum on interpretative notes for the *Official Records* (travaux préparatoires) *of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (A/55/383/Add.1).

[503] See article 7 of the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, *Yearbook ... 1972*, vol. II, pp. 319-320; and article 10 of the draft Code of Crimes against the Peace and Security of Mankind, *Yearbook ... 1996*, vol. II (Part Two), p. 32.

[504] Similar provisions appear in: Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 1; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 1; Convention against Torture, art. 8, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 1; United Nations Convention against Transnational Organized Crime, art. 16, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, paras. 2-3. The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind provides, in art. 10, para. 1, that, "[t]o the extent that [genocide, crimes against humanity, crimes against the United Nations and associated personnel and war crimes] are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them".

[505] Genocide Convention, art. VII.

[506] See, for example, *In the Matter of the Extradition of Mousa Mohammed Abu Marzook*, United States District Court, S.D. New York, 924 F. Supp. 565 (1996), p. 577 ("if the act complained of is of such

the Model Treaty on Extradition provides that "certain crimes, such as genocide, crimes against humanity and war crimes, are regarded by the international community as so heinous that the perpetrators cannot rely on this restriction on extradition".[507] The Sub-Commission on the Promotion and Protection of Human Rights of the Commission on Human Rights declared that persons "charged with war crimes and crimes against humanity shall not be allowed to claim that the actions fall within the 'political offence' exception to extradition".[508]

(9) Contemporary bilateral extradition treaties often specify particular offences that should not be regarded as "political offences" so as to preclude extradition.[509] Although some treaties addressing specific crimes do not address the issue,[510] many contemporary multilateral treaties addressing specific crimes contain a provision barring the political offence exception to extradition.[511] For example, article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance provides:

> For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

(10) The Commission viewed the text of article 13, paragraph 1, of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance as an appropriate model for draft article 13, paragraph 2. Paragraph 2 clarifies that the *act* of committing a crime against humanity cannot be regarded as a "political offence". This issue differs, however, from whether a requesting State is pursuing the extradition because of the individual's political opinions; in other words, it differs from whether the State is alleging a crime against humanity and making its request for extradition as a means of persecuting an individual for his or her political views. The latter issue of persecution is addressed separately in draft article 13, paragraph 9. The final clause of paragraph 2 "on these grounds alone" signals that there may be other grounds that the State may invoke to refuse extradition (see paragraphs (16) to (18) and (24) to (26) below), provided such other grounds in fact exist.

---

heinous nature that it is a crime against humanity, it is necessarily outside the political offense exception").

[507] United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, para. 45.

[508] Sub-Commission on the Promotion and Protection of Human Rights, resolution 2001/22.

[509] See, for example, the Extradition Treaty between the Government of the United States of America and the Government of South Africa (Washington, 16 September 1999), United Nations, *Treaty Series*, vol. 2917, No. 50792, art. 4, para. 2 ("For the purposes of this Treaty, the following offences shall not be considered political offences: … (b) an offence for which both the Requesting and Requested States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their respective competent authorities for decision as to prosecution; …"); the Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), *ibid.*, vol. 1642, No. 28218, art. 4, para. 1 (a) ("Reference to a political offence shall not include … (ii) an offence in respect of which the Contracting Parties have the obligation to establish jurisdiction or extradite by reason of a multilateral international agreement to which they are both parties; and (iii) an offence against the law relating to genocide"); and the Treaty of Extradition between the Government of the United Mexican States and the Government of Canada (Mexico City, 16 March 1990), *ibid.*, vol. 1589, No. 27824, art. IV (a) ("For the purpose of this paragraph, political offence shall not include an offence for which each Party has the obligation, pursuant to a multilateral international agreement, to extradite the person sought or to submit the case to its competent authorities for the purpose of prosecution").

[510] See, for example, International Convention against the Taking of Hostages; Convention against Torture.

[511] See, for example, International Convention for the Suppression of Terrorist Bombings, art. 11; International Convention for the Suppression of the Financing of Terrorism, art. 14; United Nations Convention against Corruption, art. 44, para. 4.

States requiring a treaty to extradite

(11) Draft article 13, paragraphs 3 and 4, address the situation where a requested State requires the existence of a treaty before it can extradite an individual to the requesting State.

(12) Paragraph 3 provides that, in such a situation, the requested State "may" use the present draft articles as the legal basis for the extradition in respect of crimes against humanity. As such, a State is not obliged to use the present draft articles for such purpose, but may elect to do so. This paragraph is modelled on article 44, paragraph 5, of the 2003 United Nations Convention against Corruption, which reads: "If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies".[512] The same or a similar provision may be found in numerous other treaties,[513] and the Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.[514]

(13) Paragraph 4 obligates each State that makes extradition conditional on the existence of a treaty to inform the Secretary-General of the United Nations whether it will use the present draft articles as the legal basis for extradition in relation to crimes against humanity. Further, if it does not intend to use the present draft articles for that purpose, the State shall seek, where appropriate, to conclude treaties to that end. This paragraph is modelled on article 16, paragraph 5, of the 2000 United Nations Convention against Transnational Organized Crime, and on article 44, paragraph 6, of the 2003 United Nations Convention against Corruption, the latter of which reads:

> A State Party that makes extradition conditional on the existence of a treaty shall:
>
> (a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and
>
> (b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(14) Draft article 13, paragraph 4 (b), obliges a State party that does not use the draft articles as the legal basis for extradition to "seek, where appropriate, to conclude" extradition treaties with other States. As such, States are not obliged under the present draft articles to conclude extradition treaties with every other State with respect to crimes against humanity but, rather, are encouraged to pursue appropriate efforts in that regard.[515]

---

[512] United Nations Convention against Corruption, art. 44, para. 5.

[513] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; International Convention against the Taking of Hostages, art. 10, para. 2; Convention against Torture, art. 8, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 4.

[514] *Yearbook … 1996*, vol. II (Part Two), p. 32, art. 10, para. 2 ("If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State").

[515] See Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Analytical report of the Secretariat on the Implementation of the United Nations Convention against Transnational Organized Crime: updated information based on additional responses received from States for the first reporting cycle (CTOC/COP/2005/2/Rev.1), para. 69.

States not requiring a treaty to extradite

(15) Draft article 13, paragraph 5, applies to States that do not make extradition conditional on the existence of a treaty. With respect to those States, paragraph 5 obliges them to "recognize the offences covered by the present draft articles as extraditable offences between themselves". This paragraph is modelled on article 44, paragraph 7, of the 2003 United Nations Convention against Corruption.[516] Similar provisions may be found in many other treaties addressing crimes.[517] The Commission's 1996 draft Code of Crimes against the Peace and Security of Mankind also contains such a provision.[518]

Requirements of the requested State's national law

(16) Draft article 13, paragraph 6, provides that extradition "shall be subject to the conditions provided for by the national law of the requested State or by applicable extradition treaties, including the grounds upon which the requested State may refuse extradition". Similar provisions may be found in various global[519] and regional[520] treaties. This paragraph is modelled on article 44, paragraph 8, of the 2003 United Nations Convention against Corruption, but does not retain language after the word "including" that reads "*inter alia*, conditions in relation to the minimum penalty requirement for extradition and".[521] The Commission was of the view that reference to minimum penalty requirements was inappropriate in the context of allegations of crimes against humanity.

(17) This paragraph states the general rule that, while the extradition is to proceed in accordance with the rights, obligations and procedures set forth in the present draft articles, it remains subject to conditions set forth in the requested State's national law or in extradition treaties. Such conditions may relate to procedural steps, such as the need for a decision by a national court or a certification by a minister prior to the extradition, or may relate to situations where extradition is prohibited, such as: a prohibition on the extradition of the State's nationals or permanent residents; a prohibition on extradition where the offence at issue is punishable by the death penalty; a prohibition on extradition to serve a sentence that is based upon a trial *in absentia*; or a prohibition on extradition based on the

---

[516] United Nations Convention against Corruption, art. 44, para. 7 ("States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves").

[517] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 3; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 3; International Convention against the Taking of Hostages, art. 10, para. 3; Convention against Torture, art. 8, para. 3; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988), United Nations, *Treaty Series*, vol. 1582, No. 27627, p. 95, art. 6, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 5.

[518] *Yearbook ... 1996*, vol. II (Part Two), p. 32, art. 10, para. 3 ("States Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State").

[519] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 2; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 2; Convention against Torture, art. 8, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 2; the International Convention for the Suppression of Terrorist Bombings, art. 9, para. 2; International Convention for Suppression of the Financing of Terrorism, art. 11, para. 2; United Nations Convention against Transnational Organized Crime, art. 16, para. 7; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 6.

[520] See, for example, Inter-American Convention to Prevent and Punish Torture, art. 13; Inter-American Convention on Forced Disappearance of Persons, art. V; Council of Europe Criminal Law Convention on Corruption, art. 27, para. 4.

[521] United Nations Convention against Corruption, art. 44, para. 8 ("Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition").

rule of speciality.[522] At the same time, some grounds for refusal found in national law would be impermissible under the present draft articles, such as the invocation of a statute of limitation in contravention of draft article 6, paragraph 6, or may be impermissible under other rules of international law.

(18) Whatever the reason for refusing extradition, in the context of the present draft articles, the requested State in which the offender is present remains obliged to submit the matter to its prosecuting authorities under draft article 10. Thus, while the requested State's national law may preclude extradition to a requesting State in certain circumstances, the requested State remains obliged to submit the case to its competent authorities for the purpose of prosecution.

Deeming the offence to have occurred in the requesting State

(19) Draft article 13, paragraph 7, addresses the situation where a requested State, under its national law, may only extradite a person to a State where the crime occurred.[523] To facilitate extradition to a broader range of States, paragraph 7 provides that, "[i]f necessary, the offences covered by the present draft articles shall be treated, for the purposes of extradition between States, as if they had been committed not only in the place in which they occurred but also in the territory of the States that have established jurisdiction in accordance with draft article 7, paragraph 1". This text is modelled on article 11, paragraph 4, of the 1999 International Convention for the Suppression of the Financing of Terrorism[524] and has been used in many treaties addressing crimes.[525]

(20) Treaty provisions of this kind refer to "States that have established jurisdiction" under the treaty on the basis of connections such as the nationality of the alleged offender or of the victims of the crime (hence, draft article 13, paragraph 7, contains a cross-reference to draft article 7, paragraph 1). Such provisions do not refer to States that have established jurisdiction based on the presence of the offender (draft article 7, paragraph 2), because the State requesting extradition is never the State in which the alleged offender is already present. In this instance, there is also no cross-reference to draft article 7, paragraph 3, which does not require States to establish jurisdiction but, rather, preserves the right of States to establish national jurisdiction beyond the scope of the present draft articles.

(21) In its commentary to the 1996 draft Code of Crimes against the Peace and Security of Mankind, which contains a similar provision in article 10, paragraph 4,[526] the Commission stated that "[p]aragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State party … with respect to the crimes" established in the draft Code, and that "[t]his broader approach is consistent with the general obligation of every State party to establish its jurisdiction over [those] crimes".[527] Such an approach also "finds further justification in the fact that the Code does not confer

---

[522] See, for example, the United Kingdom Extradition Act, sect. 17.

[523] See *Yearbook … 1996*, vol. II (Part Two), p. 33, para. (3) of the commentary to draft article 10 ("Under some treaties and national laws, the custodial State may only grant requests for extradition coming from the State in which the crime occurred").

[524] International Convention for the Suppression of the Financing of Terrorism, art. 11, para. 4.

[525] Convention for the Suppression of Unlawful Seizure of Aircraft, art. 8, para. 4; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 8, para. 4; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 8, para. 4; International Convention against the Taking of Hostages, art. 10, para. 4; Convention against Torture, art. 8, para. 4; Convention on the Safety of United Nations and Associated Personnel, art. 15, para. 4; International Convention for the Suppression of Terrorist Bombings, art. 9, para. 4. Some recent treaties, however, have not contained such a provision. See, for example, United Nations Convention against Transnational Organized Crime; United Nations Convention against Corruption; International Convention for the Protection of All Persons from Enforced Disappearance.

[526] *Yearbook … 1996*, vol. II (Part Two), p. 32 ("Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party").

[527] *Ibid.*, p. 33 (para. (3) of the commentary to draft article 10).

primary jurisdiction on any particular States nor establish an order of priority among extradition requests".[528]

Enforcement of a sentence imposed upon a State's own nationals

(22) Draft article 13, paragraph 8, concerns situations where the national of a requested State is convicted and sentenced in a foreign State, and then flees to the requested State, but the requested State is unable under its law to extradite its nationals. In such a situation, paragraph 8 provides that "the requested State shall, if its national law so permits and in conformity with the requirements of such law, upon application of the requesting State, consider the enforcement of the sentence imposed under the national law of the requesting State or the remainder thereof". Similar provisions are found in the 2000 United Nations Convention against Transnational Organized Crime[529] and the 2003 United Nations Convention against Corruption.[530]

(23) The Commission also considered inclusion of a paragraph in draft article 13 that would expressly address the situation where the requested State can extradite one of its nationals, but only if the alleged offender will be returned to the requested State to serve out any sentence imposed by the requesting State. Such a provision may be found in the 2000 United Nations Convention against Transnational Organized Crime[531] and the 2003 United Nations Convention against Corruption.[532] The Commission deemed such a situation as falling within the scope of conditions that may be applied under draft article 13, paragraph 6, of the present draft articles and therefore decided that an express provision on this issue was not necessary.

Refusal to extradite

(24) Draft article 13, paragraph 9, makes clear that nothing in draft article 13 requires a State to extradite an individual to a State where there are substantial grounds for believing that the extradition request is being made on grounds that are universally recognized as impermissible under international law. Such a provision appears in various multilateral[533] and bilateral treaties,[534] and in national laws,[535] that address extradition generally, and appears in treaties addressing extradition with respect to specific crimes.[536]

---

[528] *Ibid.*

[529] United Nations Convention against Transnational Organized Crime, art. 16, para. 10.

[530] United Nations Convention against Corruption, art. 44, para. 13.

[531] United Nations Convention against Transnational Organized Crime, art. 16, para. 11.

[532] United Nations Convention against Corruption, art. 44, para. 12.

[533] See, for example, European Convention on Extradition, art. 3, para. 2; Inter-American Convention on Extradition, art. 4, para. 5.

[534] See, for example, Extradition Agreement between the Government of the Republic of India and the Government of the French Republic (Paris, 24 January 2003), art. 3, para. 3; Extradition Treaty between the Government of the United States of America and the Government of the Republic of South Africa (Washington, 16 September 1999) United Nations, *Treaty Series*, [vol. not published yet], No. 50792, art. 4, para. 3; Treaty on Extradition between Australia and the Republic of Korea (Seoul, 5 September 1990), art. 4, para. 1 (b); Treaty of Extradition between the Government of the United Mexican States and the Government of Canada, art. IV. The Model Treaty on Extradition at article 3 (b) contains such a provision. The Revised Manual on the Model Treaty on Extradition, states at paragraph 47, that: "Subparagraph (b) … is a non-controversial paragraph, one that has been used (sometimes in a modified form) in extradition treaties throughout the world".

[535] See, for example, the Extradition Law of the People's Republic of China: Order of the President of the People's Republic of China, No. 42, adopted at the 19th Meeting of the Standing Committee of the Ninth National People's Congress on 28 December 2000, art. 8, para. 4 ("The request for extradition made by a foreign State to the People's Republic of China shall be rejected if … the person sought is one against whom penal proceedings instituted or punishment may be executed for reasons of that person's race, religion, nationality, sex, political opinion or personal status, or that person may, for any of those reasons, be subjected to unfair treatment in judicial proceedings".); and the United Kingdom Extradition Act, sect. 13 ("A person's extradition … is barred by reason of extraneous considerations if (and only if) it appears that (a) the Part 1 warrant issued in respect of him (though purporting to be issued on account of the extradition offence) is in fact issued for the purpose

(25) Paragraph 9 is modelled on article 16, paragraph 14, of the 2000 United Nations Convention against Transnational Organized Crime, and article 44, paragraph 15, of the 2003 United Nations Convention against Corruption, which both read as follows:

> Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

While modelled on this provision, the term "sex" in English was replaced by "gender", and the term "culture" was added to the list of factors, in line with the language used in draft article 3, paragraph 1 (h). Further, the term "membership of a particular social group" was added to the list, as in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[537]

(26) Given that the present draft articles contain no obligation to extradite any individual, this provision, strictly speaking, is not necessary. Under the present draft articles, a State may decline to extradite, so long as it submits the case to its own competent authorities for the purpose of prosecution. Nevertheless, paragraph 9 serves three purposes. First, it helps ensure that individuals will not be extradited when there is a danger that their rights, in particular their basic rights, will be violated. Second, States that already insert a similar provision into their extradition treaties or national laws are assured that substantial grounds for believing that a person will be subjected to persecution will remain a basis of refusal for extradition. Third, States that do not have such a provision explicitly in their bilateral arrangements will have a textual basis for refusal if such a case arises. As such, the Commission considered it appropriate to include such a provision in the present draft articles.

(27) Draft article 13, paragraph 10, provides that, before the requested State refuses extradition, it "shall, where appropriate, consult with the requesting State to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation". Such consultation may allow the requesting State to modify its request in a manner that addresses the concerns of the requested State. The phrase "where appropriate", however, acknowledges that there may be times where the requested State is refusing extradition but consultation is not appropriate, for example due to reasons of confidentiality. Even so, it is stressed that, in the context of the present draft articles, draft article 10 requires the requested State, if it does not extradite, to submit the matter to its own prosecutorial authorities.

(28) Paragraph 10 is modelled on the 2000 United Nations Convention against Transnational Organized Crime[538] and the 2003 United Nations Convention against Corruption,[539] which both provide that, "[b]efore refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation". The qualification of "where appropriate" recognizes that there will be situations

---

of prosecuting or punishing him on account of his race, religion, nationality, gender, sexual orientation or political opinions, or (b) if extradited he might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race, religion, nationality, gender, sexual orientation or political opinions").

[536] See, for example, International Convention against the Taking of Hostages, art. 9; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 6, para. 6; International Convention for the Suppression of Terrorist Bombings, art. 12; International Convention for the Suppression of the Financing of Terrorism, art. 15; International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

[537] See International Convention for the Protection of All Persons from Enforced Disappearance, art. 13, para. 7.

[538] United Nations Convention against Transnational Organized Crime, art. 16, para. 16.

[539] United Nations Convention against Corruption, art. 44, para. 17.

where such consultations are not appropriate, such as when the requested State has decided to submit the case to its own competent authorities for the purpose of prosecution.

Multiple requests for extradition

(29) Treaties addressing extradition generally or in the context of specific crimes typically do not seek to regulate which requesting State should have priority if there are multiple requests for extradition. At the most, such instruments might acknowledge the discretion of the requested State to determine whether to extradite and, if so, to which requesting State. For example, the 1990 United Nations Model Treaty on Extradition, in article 16, simply provides: "If a Party receives requests for extradition for the same person from both the other Party and a third State it shall, at its discretion, determine to which of those States the person is to be extradited".[540]

(30) Consequently, in line with existing treaties, the Commission decided not to include a provision in the present draft articles specifying a preferred outcome if there are multiple requests. Even so, when such a situation occurs, a State may benefit from considering various factors in exercising their discretion, which may be identified in the State's national law. For example, the Código Orgánico Integral Penal (2014) of Ecuador provides in section 405 that "la o el juzgador ecuatoriano podrá determinar la jurisdicción que garantice mejores condiciones para juzgar la infracción penal, la protección y reparación integral de la víctima" ("the judge may determine the jurisdiction which guarantees better conditions to prosecute the criminal offence, the protection and the integral reparation of the victim").[541] In the context of the European Union, relevant factors include "the relative seriousness and place of the offences, the respective dates of the European arrest warrants and whether the warrant has been issued for the purposes of prosecution or for execution of a custodial sentence or detention order".[542]

Dual Criminality

(31) Extradition treaties typically contain a "dual criminality" requirement, whereby obligations with respect to extradition only arise in circumstances where, for a specific request, the conduct at issue is criminal in both the requesting State and the requested State.[543] Such a requirement is also sometimes included in treaties on a particular type of crime, if that treaty contains a combination of mandatory and non-mandatory offences, with the result that the offences existing in any two States parties may differ. For example, the 2003 United Nations Convention against Corruption establishes both mandatory[544] and non-mandatory[545] offences relating to corruption.

(32) By contrast, treaties focused on a particular type of crime that only establish mandatory offences typically do not contain a dual criminality requirement. Thus, treaties such as the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, which define specific offences and obligate States parties to take the necessary measures to ensure that they constitute offences under national criminal law, contain no dual criminality requirement in their respective extradition provisions. The rationale for not doing so is that when an extradition request arises under either convention, the offence should already be criminalized under the laws of both States parties, such that there is no need to satisfy a dual criminality requirement. A further rationale is that such treaties typically do not contain an absolute obligation to extradite;

---

[540] Model Treaty on Extradition, art. 16.

[541] Código Orgánico Integral Penal, section 405.

[542] See, for example, Council framework decision of 13 June 2002, art. 16, para. 1.

[543] See, for example, United Nations Office on Drugs and Crime, *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters, Part One: Revised Manual on the Model Treaty on Extradition*, at p. 10, para. 20 ("The requirement of double criminality under the laws of both the requesting and requested States of the offence for which extradition is to be granted is a deeply ingrained principle of extradition law").

[544] United Nations Convention against Corruption, arts. 15, 16, para. 1, and arts. 17, 23 and 25.

[545] *Ibid.*, arts. 16, para. 2, and arts. 18-22 and 24.

rather, they contain an *aut dedere aut judicare* obligation, whereby the requested State may always choose not to extradite, so long as it submits the case to its competent authorities for prosecution.

(33) The present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the "offences" of "crimes against humanity" exist under the national criminal law of each State.[546] As such, when an extradition request from one State is sent to another State for an offence covered by the present draft articles, the offence should be criminal in both States, and therefore dual criminality is automatically satisfied. Moreover, the *aut dedere aut judicare* obligation set forth in draft article 10 does not obligate States to extradite; rather, the State can satisfy its obligation under draft article 10 by submitting the case to its competent authorities for the purpose of prosecution. Consequently, the Commission decided that there was no need to include in draft article 13 a dual criminality requirement, such as appears in the first three paragraphs of article 44 of the 2003 United Nations Convention against Corruption.

Article 14
Mutual legal assistance

1. States shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the present draft articles in accordance with this draft article.

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State with respect to investigations, prosecutions, judicial and other proceedings in relation to the offences for which a legal person may be held liable in accordance with draft article 6, paragraph 8, in the requesting State.

3. Mutual legal assistance to be afforded in accordance with this draft article may be requested for any of the following purposes:

(a) identifying and locating alleged offenders and, as appropriate, victims, witnesses or others;

(b) taking evidence or statements from persons, including by video conference;

(c) effecting service of judicial documents;

(d) executing searches and seizures;

(e) examining objects and sites, including obtaining forensic evidence;

(f) providing information, evidentiary items and expert evaluations;

(g) providing originals or certified copies of relevant documents and records;

(h) identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes;

(i) facilitating the voluntary appearance of persons in the requesting State; or

(j) any other type of assistance that is not contrary to the national law of the requested State.

4. States shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy.

---

[546] Draft article 3, paragraph 4, provides that the draft article is without prejudice to a broader definition of crimes against humanity provided for in any national law. An extradition request based on a broader definition than is contained in draft article 3, paragraphs 1-3, however, would not be based on an offence covered by the present draft articles.

5. States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article.

6. Without prejudice to its national law, the competent authorities of a State may, without prior request, transmit information relating to crimes against humanity to a competent authority in another State where they believe that such information could assist the authority in undertaking or successfully concluding investigations, prosecutions and judicial proceedings or could result in a request formulated by the latter State pursuant to the present draft articles.

7. The provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance.

8. The draft annex to the present draft articles shall apply to requests made pursuant to this draft article if the States in question are not bound by a treaty of mutual legal assistance. If those States are bound by such a treaty, the corresponding provisions of that treaty shall apply, unless the States agree to apply the provisions of the draft annex in lieu thereof. States are encouraged to apply the draft annex if it facilitates cooperation.

Commentary

(1) A State investigating or prosecuting an offence covered by the present draft articles may wish to seek assistance from another State in gathering information and evidence, including through documents, sworn declarations and oral testimony by victims, witnesses or others. Cooperation on such matters, which is typically undertaken on a basis of reciprocity, is referred to as "mutual legal assistance". Having a legal framework regulating such assistance is useful for providing a predictable means for cooperation between the requesting and requested State.

(2) At present, there is no global or regional treaty addressing mutual legal assistance specifically in the context of crimes against humanity. Rather, to the extent that cooperation of this kind occurs, it does so through voluntary cooperation by States as a matter of comity or, if they exist, bilateral or multilateral treaties addressing mutual legal assistance with respect to crimes generally (referred to as mutual legal assistance treaties). While mutual legal assistance relating to crimes against humanity can occur through existing mutual legal assistance treaties, in many instances there will be no such treaty between the requesting and requested States.[547] As is the case for extradition, any given State often has no treaty relationship with a large number of other States on mutual legal assistance with respect to crimes generally, so that when cooperation is needed with respect to crimes against humanity, there is no legal framework in place to facilitate such cooperation.

(3) Draft article 14 seeks to provide that legal framework. Its eight paragraphs are designed to address various important elements of mutual legal assistance that will apply between the requesting and requested States, bearing in mind that in some instances there may exist a mutual legal assistance treaty between those States, while in other instances there may not. As discussed further below, draft article 14 always applies to the requesting and requested States (regardless of whether there exists a mutual legal assistance treaty between them), while the draft annex additionally applies to the requesting and requested States when there is no mutual legal assistance treaty between them, or when such a treaty does exist but the two States nevertheless agree to use the draft annex to facilitate cooperation.

---

[547] See *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (United Nations publication, Sales No. E.98.XI.5), p. 185, para. 7.22 (finding that "[t]here are still…many States that are not parties to general mutual legal assistance treaties and many circumstances in which no bilateral treaty governs the relationship between the pair of States concerned in a particular matter").

(4) The detailed provisions on mutual legal assistance appearing in draft article 14 and in the draft annex also appear in several contemporary conventions addressing specific crimes. While there is also precedent for less detailed provisions,[548] States appear attracted to the more detailed provisions, as may be seen in the drafting history of the 2000 United Nations Convention against Transnational Organized Crime. During the initial drafting, the article on mutual legal assistance was a two-paragraph provision.[549] The negotiating States decided early on,[550] however, that this less detailed approach should be replaced with a more detailed article based on article 7 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[551] The result was the detailed provisions of article 18 of the 2000 United Nations Convention against Transnational Organized Crime, which were reproduced almost in their entirety in article 46 the 2003 United Nations Convention against Corruption. Comparable provisions may also be seen in the 1999 International Convention for the Suppression of the Financing of Terrorism.[552]

(5) The Commission decided that the more detailed provisions were best suited for draft articles on crimes against humanity. Such provisions provide extensive guidance to States, which is especially useful when there exists no mutual legal assistance treaty between the requesting and requested States.[553] Moreover, as was the case for the detailed provisions on extradition contained in draft article 13, such provisions on mutual legal assistance have proven acceptable to States. For example, as of July 2017, the 2000 United Nations Convention against Transnational Organized Crime has 187 States parties and the 2003 United Nations Convention against Corruption has 181 States parties. No State party has filed a reservation objecting to the language or content of the mutual legal assistance article in either convention. Additionally, such provisions are applied on a regular basis by national law enforcement authorities, and have been explained in numerous guides and other resources, such as those issued by the United Nations Office on Drugs and Crime.[554]

(6) Draft article 14 and the draft annex are modelled on article 46 of the 2003 United Nations Convention against Corruption, but with some modifications. As a structural matter, the Commission viewed it as useful to include in the body of the draft articles provisions applicable in all circumstances, while placing in the draft annex provisions that only apply when there is no mutual legal assistance treaty between the requesting and requested State or when application of the draft annex is otherwise deemed useful to facilitate cooperation. Doing so helps to preserve a sense of balance in the draft articles, while grouping together in a single place (the draft annex) provisions applicable only in certain situations. In addition, as explained below, some of the provisions of article 46 have been revised, relocated, or deleted.

(7) Draft article 14, paragraph 1, establishes a general obligation for States parties to "afford one another the widest measure of mutual legal assistance" with respect to offences arising under the present draft articles. The text is verbatim from article 46, paragraph 1, of

---

[548] See, for example, Convention against Torture, art. 9; International Convention for the Suppression of Terrorist Bombings, art. 10; International Convention for the Protection of All Persons from Enforced Disappearance, art. 14.

[549] See Commission on Crime Prevention and Criminal Justice, report of the Secretary-General on the question of the elaboration of an International Convention against Organized Transnational Crime (E/CN.15/1997/7/Add.1), p. 15.

[550] *Ibid.* (suggestions of Australia and Austria).

[551] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7.

[552] The mutual legal assistance provisions in the International Convention for the Suppression of the Financing of Terrorism are scattered among several articles, many of which concern both mutual assistance and extradition. See International Convention for the Suppression of the Financing of Terrorism, arts. 7, para. 5, and 12-16. More commonly, mutual legal assistance provisions are aggregated in a single article.

[553] See United Nations Office on Drugs and Crime, *State of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation* (New York, United Nations, 2015), pp. 190, 206-207.

[554] See footnote 502 above.

the 2003 United Nations Convention against Corruption,[555] except for the reference to "offences covered by the present draft articles". Importantly, States are obliged to afford each other such assistance not just in "investigations" but also in "prosecutions" and "judicial proceedings". As such, the obligation is intended to ensure that the broad goals of the present draft articles are furthered by comprehensive cooperation among States at all stages of the law enforcement process.

(8) Draft article 14, paragraph 2, addresses such cooperation in the specific context of the liability of legal persons, using a different standard than exists in paragraph 1. Such cooperation is to occur only "to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State". This standard is a recognition that national legal systems differ considerably in their treatment of legal persons in relation to crimes, differences that also led to the language set forth in draft article 6, paragraph 8. Given those differences, mutual legal assistance in this context must be contingent on the extent to which such cooperation is possible.

(9) The text of draft article 14, paragraph 2, is almost verbatim from article 46, paragraph 2, of the 2003 United Nations Convention against Corruption,[556] but for the addition of "and other" in "investigations, prosecutions, judicial *and other* proceedings" in relation to offences for which a legal person may be held liable. This change was regarded as useful given that, under some national legal systems, other types of proceedings might be relevant with respect to legal persons, such as administrative proceedings.

(10) Draft article 14, paragraph 3, lists types of assistance that may be requested. These types of assistance are drafted in broad terms and, in most respects, replicate the types of assistance listed in many multilateral[557] and bilateral[558] extradition treaties. Indeed, such terms are broad enough to encompass the range of assistance that might be relevant for the investigation and prosecution of a crime against humanity, including the seeking of: police and security agency records; court files; citizenship, immigration, birth, marriage, and death records; health records; forensic material; and biometric data. The list is not exhaustive, as

---

[555] United Nations Convention against Corruption, art. 46, para. 1 ("States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention"). See also United Nations Convention against Transnational Organized Crime, art. 18, para. 1; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 1.

[556] United Nations Convention against Corruption, art. 46, para. 2 ("Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party"). During the negotiations for the 2000 United Nations Convention against Transnational Organized Crime, the issue of the variety of national practice on the question of liability of legal persons, particularly in criminal cases, led several delegations to propose a specific mutual legal assistance provision on legal persons, which was ultimately adopted as paragraph 2 of article 18. During the later negotiation of the 2003 United Nations Convention against Corruption, three proposals were put forward for the provision on mutual legal assistance, one of which failed to include an express provision on mutual legal assistance regarding legal persons. Travaux Préparatoires *of the Negotiation for the Elaboration of the United Nations Convention against Corruption*, pp. 374-377, footnote 5. By the second negotiating meeting, that proposal was dropped from consideration (*ibid.*, p. 378, footnote 7), leading ultimately to the adoption of paragraph 2 of article 46.

[557] See, for example, Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), Organization of American States, *Treaty Series*, No. 75, art. 7; Association of Southeast Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters (Kuala Lumpur, 29 November 2004), United Nations, *Treaty Series*, vol. 2336, No. 41878, p. 271, art. 1, para. 2; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 3.

[558] See, for example, 1990 Model Treaty on Mutual Assistance in Criminal Matters, General Assembly resolution 45/117 of 14 December 1990, annex, art. 1, para. 2; Treaty between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters (Moscow, 17 June 1999), United Nations, *Treaty Series*, vol. 2916, No. 50780, art. 2.

it provides in subparagraph (j) a catch-all provision relating to "any other type of assistance that is not contrary to the national law of the requested State".

(11) Paragraph 3 is modelled on article 46, paragraph 3, of the 2003 United Nations Convention against Corruption. Under that Convention, any existing bilateral mutual legal assistance treaty between States parties that lack the forms of cooperation listed in paragraph 3 are generally considered "as being automatically supplemented by those forms of cooperation".[559] The Commission made some modifications to the text of article 46, paragraph 3, for the purposes of draft article 14, paragraph 3, given that the focus of the present draft articles is on crimes against humanity, rather than on corruption.

(12) A new subparagraph (a) was added to highlight mutual legal assistance for the purpose of "identifying and locating alleged offenders and, as appropriate, victims, witnesses or others". The phrase "as appropriate" recognizes that privacy concerns should be considered with respect to victims, witnesses and others, while the phrase "others" should be understood as including experts or other individuals helpful to the investigation or prosecution of an alleged offender. Subparagraph (b) was also modified to include the possibility of a State providing mutual legal assistance through video conferencing for purposes of obtaining testimony or other evidence from persons. This was considered appropriate given the growing use of such testimony and its particular advantages for transnational law enforcement, as is also recognized in paragraph 16 of the draft annex.[560] Subparagraph (e), which allows a State to request mutual legal assistance in "examining objects and sites", was modified to emphasize the ability to collect forensic evidence relating to crimes against humanity, given the importance of such evidence (such as exhumation and examination of grave sites) in investigating fully such crimes.

(13) Subparagraph (g), which allows a State to request assistance in obtaining "originals or certified copies of relevant documents and records", was modified to delete the illustrative listing contained in the 2003 United Nations Convention against Corruption,[561] which was viewed as unduly focused on financial records. While such records may be relevant with respect to crimes against humanity, other types of records (such as death certificates and police reports) are likely to be just as, if not more, relevant. Similarly, two types of assistance listed in the 2003 United Nations Convention against Corruption — at subparagraphs (j) and (k)[562] — were not included, as they refer to that Convention's detailed provisions on asset recovery, which are not included in the present draft articles.

(14) Although the 2003 United Nations Convention against Corruption lists together "[e]xecuting searches and seizures, and freezing",[563] the Commission deemed it appropriate to move the word "freezing" to subparagraph (h), which deals with proceeds of the crime, so as to read "identifying, tracing or freezing proceeds of crime, property, instrumentalities or other things for evidentiary or other purposes". The words "or other purposes" were added so as to capture purposes that are not evidentiary in nature, such as restitution of property to victims.

---

[559] *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 170, para. 605 (advising also that under some national legal systems, amending legislation may be required to incorporate additional bases of cooperation).

[560] This provision permits a State to allow a "hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State". This paragraph is based on paragraph 18 of article 46 of the 2003 United Nations Convention against Corruption.

[561] United Nations Convention against Corruption, art. 46, para. 3 ("(f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records").

[562] United Nations Convention against Corruption, art. 46, para. 3 ("(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention; (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention"). These provisions also do not appear in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances or the 2000 United Nations Convention against Transnational Organized Crime.

[563] United Nations Convention against Corruption, art. 46, para. 3 (c).

(15) Draft article 14, paragraph 4, provides that States "shall not decline to render mutual legal assistance pursuant to this draft article on the ground of bank secrecy". This same language is used in article 46, paragraph 8, of the 2003 United Nations Convention against Corruption[564] and similar language appears in other multilateral and bilateral treaties on mutual legal assistance.[565] While such a provision may not be commonly needed for the present draft articles, given that the offences at issue are not likely to be financial in nature, a crime against humanity can entail a situation where assets are stolen, and where mutual legal assistance regarding those assets might be valuable, not just for proving the crime but also for the recovery and return of those assets to the victims. While the reference is to "bank" secrecy, the provision is intended to cover all financial institutions whether or not technically regarded as a bank.[566]

(16) Draft article 14, paragraph 5, provides that "States shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to, or enhance the provisions of this draft article". While this provision, which is based on article 46, paragraph 30, of the 2003 United Nations Convention against Corruption,[567] does not obligate States to take any particular action in this regard, it encourages States to consider concluding additional multilateral or bilateral treaties to improve the implementation of article 14.

(17) Draft article 14, paragraph 6, acknowledges that a State may transmit information to another State, even in the absence of a formal request, if it is believed that doing so could assist the latter in undertaking or successfully concluding investigations, prosecutions and judicial proceedings, or might lead to a formal request by the latter State. Though innovative when first used in the 2000 United Nations Convention against Transnational Organized Crime,[568] this provision was replicated in article 46, paragraph 4, of the 2003 United Nations Convention against Corruption. The provision is stated in discretionary terms, providing that a State "may" transmit information, and is further conditioned by the clause "without prejudice to national law". In practice, States frequently engage in such informal exchanges of information.[569]

(18) In both the 2000 United Nations Convention against Transnational Organized Crime and the 2003 United Nations Convention against Corruption, there is a further provision providing more detail as to the treatment of transmitted information.[570] While such details

---

[564] See *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, pp. 171, paras. 611-12; *State of Implementation of the United Nations Convention against Corruption*, pp. 160, 190 and 195.

[565] See, for example, United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 5; United Nations Convention against Transnational Organized Crime, art. 18, para. 8; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 2; ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, art. 3, para. 5.

[566] The 1990 Model Treaty on Mutual Assistance in Criminal Matters refers to not refusing assistance on the ground of secrecy of "banks and similar financial institutions". Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 2. Most treaties, however, refer solely to "bank secrecy", which is interpreted as covering other financial institutions as well. See, for example, *State of Implementation of the United Nations Convention against Corruption*, p. 121.

[567] United Nations Convention against Corruption, art. 46, para. 30. See United Nations Convention against Transnational Organized Crime, art. 18, para. 30; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 20.

[568] United Nations Convention against Transnational Organized Crime, art. 18, para. 4.

[569] *State of Implementation of the United Nations Convention against Corruption*, p. 194.

[570] United Nations Convention against Transnational Organized Crime, art. 18, para. 5; United Nations Convention against Corruption, art. 46, para. 5. During the adoption of the United Nations Convention against Transnational Organized Crime, an official interpretative note indicated that: "(a) when a State Party is considering whether to spontaneously provide information of a particularly sensitive nature or is considering placing strict restrictions on the use of information thus provided, it is considered advisable for the State Party concerned to consult with the potential receiving State beforehand; (b) when a State Party that receives information under this provision already has similar information in its possession, it is not obliged to comply with any restrictions imposed by the transmitting State". A/55/383/Add.1, para. 37.

may be useful in some circumstances, for the purposes of the present draft articles the Commission deemed draft article 14, paragraph 6, to be sufficient in providing a basis for such cooperation.

(19) Draft article 14, paragraph 7, addresses the relationship of draft article 14 to any mutual legal assistance treaty existing between the requesting and requested States. Paragraph 7 makes clear that the "provisions of this draft article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance, except that the provisions of this draft article shall apply to the extent that they provide for greater mutual legal assistance". In other words, any other mutual legal assistance treaty in place between the two States continues to apply,[571] but is supplemented by the provisions of draft article 14 if such provisions provide for a higher level of mutual legal assistance. This provision draws upon the language of article 46, paragraph 6, of the 2003 United Nations Convention against Corruption,[572] but adds the "except" clause, expressly to indicate what is regarded as implicit in article 46, paragraph 6, and comparable provisions.[573]

(20) Draft article 14, paragraph 8, addresses the application of the draft annex, which is an integral part of the present draft articles. Paragraph 8, which is based on article 46, paragraph 7, of the 2003 United Nations Convention against Corruption,[574] provides that the draft annex applies when there exists no mutual legal assistance treaty between the requesting and requested State. As such, the draft annex does not apply when there exists a mutual legal assistance treaty between the requesting and requested State. Even so, paragraph 8 notes that the two States could agree to apply the provisions of the draft annex if they wish to do so, and are so encouraged if doing so facilitates cooperation.

(21) As was the case with respect to draft article 13 on extradition, the Commission decided that there was no need to include in draft article 14 a dual criminality requirement, such as appears in article 46, paragraph 9, of the 2003 United Nations Convention against Corruption.[575] As previously noted, the present draft articles on crimes against humanity define crimes against humanity in draft article 3 and, based on that definition, mandate in draft article 6, paragraphs 1 to 3, that the "offences" of "crimes against humanity" exist under national criminal laws of each State. As such, dual criminality should automatically be satisfied in the case of a request for mutual legal assistance under the present draft articles.

---

[571] *Yearbook ... 1972*, vol. II, p. 321, commentary to art. 10, para. 1 (asserting that, with respect to a similar provision in the draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons: "Mutual assistance in judicial matters has been a question of constant concern to States and is the subject of numerous bilateral and multilateral treaties. The obligations arising out of any such treaties existing between States party to the present draft are fully preserved under this article").

[572] United Nations Convention against Corruption, art. 46, para. 6. ("The provisions of this article shall not affect the obligations under any other treaty, bilateral or multilateral, that governs or will govern, in whole or in part, mutual legal assistance"). See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 6; United Nations Convention against Transnational Organized Crime, art.18, para. 6.

[573] See, for example, *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 184, para. 7.20 ("This means that where the Convention requires the provision of a higher level of assistance in the context of illicit trafficking than is provided for under the terms of an applicable bilateral or multilateral mutual legal assistance treaty, the provisions of the Convention will prevail").

[574] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 7; United Nations Convention against Transnational Organized Crime, art.18, para. 7. See also *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 185, para. 7.23; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 171, para. 608.

[575] United Nations Convention against Corruption, art. 46, para. 9; see *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 172, para. 616 ("States parties still have the option to refuse such requests on the basis of lack of dual criminality. At the same time, to the extent this is consistent with the basic concepts of their legal system, States parties are required to render assistance involving non-coercive action").

Article 15
Settlement of disputes

1. States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations.

2. Any dispute between two or more States concerning the interpretation or application of the present draft articles that is not settled through negotiation shall, at the request of one of those States, be submitted to the International Court of Justice, unless those States agree to submit the dispute to arbitration.

3. Each State may declare that it does not consider itself bound by paragraph 2 of this draft article. The other States shall not be bound by paragraph 2 of this draft article with respect to any State that has made such a declaration.

4. Any State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration.

Commentary

(1) Draft article 15 addresses the settlement of disputes concerning the interpretation or application of the present draft articles. There is currently no obligation upon States to resolve disputes arising between them specifically in relation to the prevention and punishment of crimes against humanity. To the extent that such disputes are addressed, it occurs in the context of an obligation relating to dispute settlement that is not specific to such crimes.[576] Crimes against humanity also have been mentioned in the European Court of Human Rights and the Inter-American Court of Human Rights when evaluating issues such as fair trial rights,[577] *ne bis in idem*,[578] *nullum crimen, nulla poena sine praevia lege poenali*[579] and the legality of amnesty provisions.[580]

(2) Draft article 15, paragraph 1, provides that "States shall endeavour to settle disputes concerning the interpretation or application of the present draft articles through negotiations". This text is modelled on article 66, paragraph 1, of the 2003 United Nations Convention against Corruption.[581] The *travaux préparatoires* relating to the comparable provision of the 2000 United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational

---

[576] For example, crimes against humanity arose before the International Court of Justice in the context of counter-claims filed by Italy in the case brought by Germany under the 1957 European Convention for the Peaceful Settlement of Disputes (*Jurisdictional Immunities of the State (Germany v. Italy), Counter-Claim, Order of 6 July 2010, I.C.J. Reports 2010*, p. 310, at pp. 311-312, para. 3). In that instance, however, the Court found that, since the counterclaim by Italy related to facts and situations existing prior to the entry into force of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, they fell outside the scope of the Court's jurisdiction (*ibid.*, at pp. 320-321, para. 30).

[577] *Streletz, Kessler and Krenz v. Germany*, Application Nos. 34044/96, 35532/97 and 44801/98, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights (concurring opinion of Judge Loucaides); and *K.-H. W. v. Germany*, Application No. 37201/97, Judgment of 22 March 2001, Grand Chamber, European Court of Human Rights, ECHR 2001-II (extracts) (concurring opinion of Judge Loucaides).

[578] *Almonacid-Arellano*, Judgment, 26 September 2006 (see footnote 27 above), para. 154.

[579] *Kolk and Kislyiy v. Estonia*, Application Nos. 23052/04 and 24018/04, Decision on admissibility of 17 January 2006, European Court of Human Rights, ECHR 2006-1.

[580] *Barrios Altos v. Peru*, Judgment of 14 March 2001 (see footnote 427 above) (concurring opinion of Judge Sergio Garcia-Ramirez), para. 13; *Gelman v. Uruguay*, Judgment of 24 February 2011 (Merits and Reparations), Inter-American Court of Human Rights, Series C, No. 221, paras. 198 and 210; and *Marguš v. Croatia*, Application No. 4455/10, Judgment of 27 May 2014, Grand Chamber, European Court of Human Rights, ECHR 2014 (extracts), paras. 130-136.

[581] See also United Nations Convention against Transnational Organized Crime, art. 35, para. 1; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 1.

Organized Crime, indicate that such a provision "is to be understood in a broad sense to indicate an encouragement to States to exhaust all avenues of peaceful settlement of disputes, including conciliation, mediation and recourse to regional bodies".[582]

(3) Draft article 15, paragraph 2, provides that a dispute concerning the interpretation or application of the present draft articles that "is not settled through negotiation" shall be submitted to compulsory dispute settlement. Although there is no prescribed means or period of time for pursuing such negotiation, a State should make a genuine attempt at negotiation[583] and not simply protest the conduct of the other State.[584] If negotiation fails, most treaties addressing crimes within national law oblige an applicant State to pursue arbitration prior to submission of the dispute to the International Court of Justice.[585] The Commission, however, deemed it appropriate in the context of the present draft articles, which address crimes against humanity, to provide for immediate resort to the International Court of Justice, unless the two States agree to submit the matter to arbitration. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide likewise provides for immediate resort to the International Court of Justice for dispute settlement.[586]

(4) Draft article 15, paragraph 3, provides that a "State may declare that it does not consider itself bound by paragraph 2", in which case "other States shall not be bound by paragraph 2" with respect to that State. Most treaties that address crimes under national law and that provide for inter-State dispute settlement allow a State party to opt out of compulsory dispute settlement.[587] For example, article 66, paragraph 3, of the 2003 United

---

[582] Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Official Records* (travaux préparatoires) *of the negotiation of the United Nations Convention against Transnational Organized Crime, Tenth session, Vienna, 17-28 July 2000* (A/AC.254/33), para. 34.

[583] For analysis of similar provisions, see *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 70, at p. 132, para. 157 (finding that there must be, "at the very least[,] a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute"); *ibid.*, p. 133, para. 159 ("the precondition of negotiation is met only when there has been a failure of negotiations, or when negotiations have become futile or deadlocked"); *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at pp. 445-446, para. 57 ("The requirement … could not be understood as referring to a theoretical impossibility of reaching a settlement".); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment of 31 December 1961, I.C.J. Reports 1962*, p. 319, at p. 345 (the requirement implies that "no reasonable probability exists that further negotiations would lead to a settlement").

[584] See, for example, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6, at pp. 40-41, para. 91.

[585] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 20, para. 1; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 1; International Convention against the Taking of Hostages, art. 16, para. 1; Convention against Torture, art. 30, para. 1; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 1; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 1; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 1; United Nations Convention against Transnational Organized Crime, art. 35, para. 2; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 2; United Nations Convention against Corruption, art. 66, para. 2. Article 22 of the International Convention on the Elimination of All Forms of Racial Discrimination requires the dispute to be submitted first to the Committee on the Elimination of Racial Discrimination, which in turn may place the matter before an ad hoc conciliation commission. International Convention on the Elimination of All Forms of Racial Discrimination, arts. 11-13 and 22.

[586] Genocide Convention, art. IX; see also OAU Convention on the Prevention and Combating of Terrorism, art. 22, para. 2.

[587] See, for example, Convention for the Suppression of Unlawful Seizure of Aircraft, art. 12, para. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, art. 13, para. 2; International Convention against the Taking of

Nations Convention against Corruption provides that "[e]ach State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Convention, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation". As previously noted, at present there are 181 States parties to the 2003 United Nations Convention against Corruption; of those, 42 States parties have filed a reservation declaring that they do not consider themselves bound by paragraph 2 of article 66.[588]

(5) Draft article 15, paragraph 4, provides that "[a]ny State that has made a declaration in accordance with paragraph 3 of this draft article may at any time withdraw that declaration". Recent treaties that address crimes under national law and that provide for inter-State dispute settlement also contain such a provision.[589] For example, article 66, paragraph 4, of the 2003 United Nations Convention against Corruption provides: "Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations".

(6) The view was expressed according to which the present draft articles should not include a provision on settlement of disputes, since it constituted a final clause, a category of provisions that the Commission decided not to include in the present draft articles. On the other hand, the view was expressed that draft article 15 on settlement of disputes should establish the compulsory jurisdiction of the International Court of Justice as in article IX of the Genocide Convention.

Annex

1. This draft annex applies in accordance with draft article 14, paragraph 8.

Designation of a central authority

2. Each State shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified by each State of the central authority designated for this purpose. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities

---

Hostages, art. 16, para. 2; Convention against Torture, art. 30, para. 2; Convention on the Safety of United Nations and Associated Personnel, art. 22, para. 2; International Convention for the Suppression of Terrorist Bombings, art. 20, para. 2; International Convention for the Suppression of the Financing of Terrorism, art. 24, para. 2; United Nations Convention against Transnational Organized Crime, art. 35, para. 3; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 3; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 2.

[588] The European Union also filed a declaration to article 66, paragraph 2, stating: "With respect to Article 66, paragraph 2, the Community points out that, according to Article 34, paragraph 1, of the Statute of the International Court of Justice, only States may be parties before that Court. Therefore, under Article 66, paragraph 2, of the Convention, in disputes involving the Community, only dispute settlement by way of arbitration will be available".

[589] See, for example, United Nations Convention against Transnational Organized Crime, art. 35, para. 4; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, art. 15, para. 4; International Convention for the Protection of All Persons from Enforced Disappearance, art. 42, para. 3.

designated by the States. This requirement shall be without prejudice to the right of a State to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States agree, through the International Criminal Police Organization, if possible.

Procedures for making a request

3. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State, under conditions allowing that State to establish authenticity. The Secretary-General of the United Nations shall be notified by each State of the language or languages acceptable to that State. In urgent circumstances and where agreed by the States, requests may be made orally, but shall be confirmed in writing forthwith.

4. A request for mutual legal assistance shall contain:

(a) the identity of the authority making the request;

(b) the subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;

(c) a summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;

(d) a description of the assistance sought and details of any particular procedure that the requesting State wishes to be followed;

(e) where possible, the identity, location and nationality of any person concerned; and

(f) the purpose for which the evidence, information or action is sought.

5. The requested State may request additional information when it appears necessary for the execution of the request in accordance with its national law or when it can facilitate such execution.

Response to the request by the requested State

6. A request shall be executed in accordance with the national law of the requested State and, to the extent not contrary to the national law of the requested State and where possible, in accordance with the procedures specified in the request.

7. The requested State shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State and for which reasons are given, preferably in the request. The requested State shall respond to reasonable requests by the requesting State on progress of its handling of the request. The requesting State shall promptly inform the requested State when the assistance sought is no longer required.

8. Mutual legal assistance may be refused:

(a) if the request is not made in conformity with the provisions of this draft annex;

(b) if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests;

(c) if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) if it would be contrary to the legal system of the requested State relating to mutual legal assistance for the request to be granted.

9. Reasons shall be given for any refusal of mutual legal assistance.

10. Mutual legal assistance may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

11. Before refusing a request pursuant to paragraph 8 of this draft annex or postponing its execution pursuant to paragraph 10 of this draft annex, the requested State shall consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions.

12. The requested State:

(a) shall provide to the requesting State copies of government records, documents or information in its possession that under its national law are available to the general public; and

(b) may, at its discretion, provide to the requesting State in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its national law are not available to the general public.

Use of information by the requesting State

13. The requesting State shall not transmit or use information or evidence furnished by the requested State for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State. Nothing in this paragraph shall prevent the requesting State from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State shall notify the requested State prior to the disclosure and, if so requested, consult with the requested State. If, in an exceptional case, advance notice is not possible, the requesting State shall inform the requested State of the disclosure without delay.

14. The requesting State may require that the requested State keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State.

Testimony of person from the requested State

15. Without prejudice to the application of paragraph 19 of this draft annex, a witness, expert or other person who, at the request of the requesting State, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in territory under the jurisdiction of the requesting State shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the requested State. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in territory under the jurisdiction of the requesting State or, having left it, has returned of his or her own free will.

16. Wherever possible and consistent with fundamental principles of national law, when an individual is in territory under the jurisdiction of a State and has to be heard as a witness or expert by the judicial authorities of another State, the first State may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State. States may agree that the hearing shall be conducted by a judicial authority of the requesting State and attended by a judicial authority of the requested State.

Transfer for testimony of person detained in the requested State

17. A person who is being detained or is serving a sentence in the territory under the jurisdiction of one State whose presence in another State is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by the present draft articles, may be transferred if the following conditions are met:

(a) the person freely gives his or her informed consent; and

(b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.

18. For the purposes of paragraph 17 of this draft annex:

(a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;

(b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;

(c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person; and

(d) the person transferred shall receive credit for service of the sentence being served from the State from which he or she was transferred for time spent in the custody of the State to which he or she was transferred.

19. Unless the State from which a person is to be transferred in accordance with paragraphs 17 and 18 of this draft annex so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in territory under the jurisdiction of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from territory under the jurisdiction of the State from which he or she was transferred.

Costs

20. The ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

Commentary

(1) Draft article 14 applies to any request for mutual legal assistance between a requesting and requested State. As indicated in draft article 14, paragraph 8, the draft annex additionally applies to a request when the requesting and requested States have no mutual legal assistance treaty between them. When those States do have such a treaty, they may choose to apply the draft annex if it facilitates cooperation.

(2) The draft annex is an integral part of the draft articles. Consequently, paragraph 1 of the draft annex provides that the draft annex "applies in accordance with draft article 14, paragraph 8".

Designation of a central authority

(3) Paragraph 2 of the draft annex requires the State to designate a central authority responsible for handling incoming and outgoing requests for assistance and to notify the Secretary-General of the United Nations of the chosen central authority. In designating a

"central authority", the focus is not on the geographical location of the authority, but rather its centralized institutional role with respect to the State or a region thereof.[590] This paragraph is based on article 46, paragraph 13, of the 2003 United Nations Convention against Corruption.[591] As of 2015, all but three States parties to that convention had designated a central authority.[592]

Procedures for making a request

(4) Paragraphs 3 to 5 of the draft annex address the procedures by which a State makes a request to another State for mutual legal assistance.

(5) Paragraph 3 of the draft annex stipulates that requests must be written and made in a language acceptable to the requested State. Further, it obligates each State to notify the Secretary-General of the United Nations about the language or languages acceptable to that State. This paragraph is based on article 46, paragraph 14, of the 2003 United Nations Convention against Corruption.[593]

(6) Paragraph 4 of the draft annex indicates what must be included in any request for mutual legal assistance, such as the identity of the authority making the request, the purpose for which the evidence, information or action is sought, and a statement of the relevant facts. While this provision lays out the minimum requirements for a request for mutual legal assistance, it should not be read to preclude the inclusion of further information if it will expedite or clarify the request. This paragraph is based on article 46, paragraph 15, of the 2003 United Nations Convention against Corruption.[594]

(7) Paragraph 5 of the draft annex allows the requested State to request supplemental information when it is either necessary to carry out the request under its national law, or when additional information would prove helpful in doing so. This paragraph is intended to encompass a broad array of situations, such as where the national law of the requested State requires more information for the request to be approved and executed or where the requested State requires new information or guidance from the requesting State on how to proceed with a specific investigation.[595] This paragraph is based on article 46, paragraph 16, of the 2003 United Nations Convention against Corruption.[596]

Response to the request by the requested State

(8) Paragraphs 6 to 12 of the draft annex address the response by the requested State to the request for mutual legal assistance.

(9) Paragraph 6 of the draft annex provides that the request "shall be executed in accordance with the national law of the requested State" and, to the extent not contrary to such law and where possible, "in accordance with the procedures specified in the request". This provision is narrowly tailored to address only the process by which the State executes the request; it does not provide grounds for refusing to respond to a request, which are

---

[590] A/55/383/Add.1, para. 40.

[591] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 8; United Nations Convention against Transnational Organized Crime, art. 18, para. 13.

[592] *State of Implementation of the United Nations Convention against Corruption*, p. 197.

[593] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 9; United Nations Convention against Transnational Organized Crime, art. 18, para. 14; *State of Implementation of the United Nations Convention against Corruption*, p. 199.

[594] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 10; United Nations Convention against Transnational Organized Crime, art. 18, para. 15; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 189, para. 7.33.

[595] *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 189-190, para. 7.34.

[596] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 11; United Nations Convention against Transnational Organized Crime, art. 18, para. 16.

addressed in paragraph 8 of the draft annex. This paragraph is based on article 46, paragraph 17, of the 2003 United Nations Convention against Corruption.[597]

(10) Paragraph 7 of the draft annex provides that the request shall be addressed as soon as possible, taking into account any deadlines suggested by the requesting State, and that the requested State shall keep the requesting State reasonably informed of its progress in handling the request. Read in conjunction with paragraph 6, paragraph 7 obligates the requested State to execute a request for mutual legal assistance in an efficient and timely manner. At the same time, paragraph 7 is to be read in the light of the permissibility of a postponement for the reason set forth in paragraph 10. Paragraph 7 is based on article 46, paragraph 24, of the 2003 United Nations Convention against Corruption.[598]

(11) Paragraph 8 of the draft annex indicates four circumstances under which a request for mutual legal assistance may be refused, and is based on article 46, paragraph 21, of the 2003 United Nations Convention against Corruption.[599] Subparagraph (a) allows a requested State to refuse mutual legal assistance when the request does not conform to the requirements of the draft annex. Subparagraph (b) allows a requested State to refuse to provide mutual legal assistance "if the requested State considers that execution of the request is likely to prejudice its sovereignty, security, *ordre public* or other essential interests". Subparagraph (c) allows mutual legal assistance to be refused "if the authorities of the requested State would be prohibited by its national law from carrying out the action requested with regard to any similar offence" if it were being prosecuted in the requested State. Subparagraph (d) allows a requested State to refuse mutual legal assistance when granting the request would be contrary to the requested State's legal system. The Commission considered whether to add an additional ground for refusal based on a principle of non-discrimination, but decided that the existing grounds (especially (b) and (d)) were sufficiently broad to embrace such a ground. Among other things, it was noted that a proposal to add such an additional ground was contemplated during the drafting of the 2000 United Nations Convention against Transnational Organized Crime, but was not included because it was viewed as already encompassed in subparagraph (b).[600]

(12) Paragraph 9 of the draft annex provides that "[r]easons shall be given for any refusal of mutual legal assistance". Such a requirement ensures the requesting State understands why the request was rejected, thereby allowing better understanding as to constraints that exist not just for that particular request but also for future requests. This paragraph is based on article 46, paragraph 23, of the 2003 United Nations Convention against Corruption.[601]

(13) Paragraph 10 of the draft annex provides that mutual legal assistance "may be postponed by the requested State on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding". This provision allows the requested State some flexibility to delay the provision of information if necessary to avoid prejudicing an

---

[597] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 12; United Nations Convention against Transnational Organized Crime, art. 18, para. 17.

[598] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 24.

[599] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 15; United Nations Convention against Transnational Organized Crime, art. 18, para. 21; European Convention on Mutual Assistance in Criminal Matters (Strasbourg, 20 April 1959), United Nations, *Treaty Series*, vol. 472, No. 6841, p. 185, art. 2; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 1. For commentary, see Council of Europe, Explanatory report to the European Convention on Mutual Assistance in Criminal Matters, document 20.IV.1969, p. 4; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 195-196, paras. 7.49-7.51; A/55/383/Add.1, para. 42.

[600] See A/55/383/Add.1, para. 42.

[601] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 16; United Nations Convention against Transnational Organized Crime, art. 18, para. 23; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 5.

ongoing investigation or proceeding of its own. This paragraph is based on article 46, paragraph 25, of the 2003 United Nations Convention against Corruption.[602]

(14) Paragraph 11 of the draft annex obliges the requested State, before refusing a request, to "consult with the requesting State to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State accepts assistance subject to those conditions, it shall comply with the conditions". In some cases, the reason for refusal may be a purely technical matter which can be easily remedied by the requesting State, in which case consultations will help clarify the matter and allow the request to proceed. A formulation of this paragraph in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances indicated only that consultations should take place regarding possible postponement of requests for mutual legal assistance.[603] The 2000 United Nations Convention against Transnational Organized Crime, however, expanded the application of this provision to cover refusals of assistance as well.[604] This approach was replicated in article 46, paragraph 26, of the 2003 United Nations Convention against Corruption,[605] upon which paragraph 11 is based.

(15) Paragraph 12 of the draft annex addresses the provision of government records, documents and information from the requested State to the requesting State, indicating that such information that is publicly available "shall" be provided, while information that is not publicly available "may" be provided. Such an approach encourages but does not require a requested State to release confidential information. This paragraph is based on article 46, paragraph 29, of the 2003 United Nations Convention against Corruption.[606]

Use of information by the requesting State

(16) Paragraphs 13 and 14 of the draft annex address the use of information received by the requesting State from the requested State.

(17) Paragraph 13 of the draft annex precludes the requesting State from transmitting the information to a third party, such as another State, and precludes it from using the information "for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State". As noted with respect to paragraph 4 of the draft annex, the requesting State must indicate in its request "the purpose for which the evidence, information or action is sought". At the same time, when the information received by the requesting State is exculpatory to an accused person, the requesting State may disclose the information to that person (as it may be obliged to do under its national law), after providing advance notice to the requested State when possible. This paragraph is based on article 46, paragraph 19, of the 2003 United Nations Convention against Corruption.[607]

(18) Paragraph 14 of the draft annex allows the requesting State to require the requested State to keep the fact and substance of the request confidential, except to the extent

---

[602] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17; United Nations Convention against Transnational Organized Crime, art. 18, para. 25; Model Treaty on Mutual Assistance in Criminal Matters, art. 4, para. 3.

[603] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 17.

[604] United Nations Convention against Transnational Organized Crime, art. 18, para. 26.

[605] United Nations Convention against Corruption, art. 46, para. 26 ("Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions").

[606] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 29.

[607] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 13; International Convention for the Suppression of the Financing of Terrorism, art. 12, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 19. For commentary, see *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 193, para. 7.43.

necessary to execute the request. This paragraph is based on article 46, paragraph 20, of the 2003 United Nations Convention against Corruption.[608]

Testimony of person from the requested State

(19) Paragraphs 15 and 16 of the draft annex address the procedures for a requesting State to secure testimony from a person present in the requested State.

(20) Paragraph 15 of the draft annex is essentially a "safe conduct" provision, which gives a person traveling from the requested State to the requesting State protection from prosecution, detention, punishment or other restriction of liberty by the requesting State during the person's testimony, with respect to acts that occurred prior to the person's departure from the requested State. As set forth in paragraph 15, such protection does not extend to acts committed after the person's departure nor does it continue indefinitely after the testimony is given. This paragraph is based on article 46, paragraph 27, of the 2003 United Nations Convention against Corruption.[609]

(21) Paragraph 16 of the draft annex addresses testimony by witnesses through video conferencing, a cost-effective technology that is becoming increasingly common. While testimony by video conference is not mandatory, if it is "not possible or desirable for the individual in question to appear in person in territory under the jurisdiction of the requesting State", then the requested State may permit the hearing to take place by video conference. This will only occur, however, when "possible and consistent with fundamental principles of national law", a clause which refers to the laws of both the requesting and the requested States. This paragraph is based on article 46, paragraph 18, of the 2003 United Nations Convention against Corruption.[610] The 2015 implementation report for the 2003 United Nations Convention against Corruption indicates that the use of this provision is widespread:

> The hearing of witnesses and experts by videoconference has proved to be a time- and cost-saving tool in the context of mutual legal assistance and can help to overcome practical difficulties, for example, when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence. Hence, there is growing acceptance and practical use of this measure by competent authorities.[611]

Transfer for testimony of person detained in the requested State

(22) Paragraphs 17 to 19 of the draft annex address the situation where a requesting State seeks the transfer from the requested State of a person who is being detained or serving a sentence in the latter.

(23) Paragraph 17 of the draft annex allows for the transfer of a person who is in the custody of the requested State to the requesting State where the person to be transferred "freely gives his or her informed consent" and the "competent authorities" of the requesting State and requested State agree to the transfer. The provision should be understood as covering persons who are in custody for criminal proceedings or serving a sentence, who are performing mandatory community service, or who are confined to particular areas under a probationary system. Although testimony may be the principal reason for such transfers, the provision also broadly covers transfer for any type of assistance sought from such a

---

[608] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 20; Model Treaty on Mutual Assistance in Criminal Matters, art. 9.

[609] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 27; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 18; Model Treaty on Mutual Assistance in Criminal Matters, art. 15; European Convention on Mutual Assistance in Criminal Matters, art. 12; *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, pp. 197-198, para. 7.55.

[610] See also United Nations Convention against Transnational Organized Crime, art. 18, para. 18; A/55/383/Add.1, para. 41; *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 174-175, para. 629.

[611] *State of Implementation of the United Nations Convention against Corruption*, p. 200.

person for "investigations, prosecutions or judicial proceedings". This paragraph is based on article 46, paragraph 10, of the 2003 United Nations Convention against Corruption.[612]

(24) Paragraph 18 of the draft annex describes the obligation of the requesting State to keep the person transferred in custody, unless otherwise agreed, and to return the transferee to the requested State in accordance with the transfer agreement, without the requested State needing to initiate extradition proceedings. This paragraph also addresses the obligation of the requested State to give credit to the transferee for the time which he or she spends in custody in the requesting State. This paragraph is based on article 46, paragraph 11, of the 2003 United Nations Convention against Corruption.[613]

(25) Paragraph 19 of the draft annex is similar to the "safe conduct" provision contained in paragraph 15, whereby the transferred person is protected from prosecution, detention, punishment or other restriction to liberty by the requesting State during the course of the person's presence in the requesting State, with respect to acts that occurred prior to the person's departure from the requested State. Paragraph 19, however, allows the requested State to agree that the requesting State may undertake such actions. Further, this provision must be read in conjunction with paragraph 18, which obliges the requesting State to keep the transferee in custody, unless otherwise agreed, based upon his or her detention or sentence in the requested State. This paragraph is based on article 46, paragraph 12, of the 2003 United Nations Convention against Corruption.[614]

Costs

(26) Paragraph 20 of the draft annex addresses the issue of costs, stating, *inter alia*, that "[t]he ordinary costs of executing a request shall be borne by the requested State, unless otherwise agreed by the States concerned". The second sentence of the provision allows for States to consult with each other where the expenses to fulfil the request will be "of a substantial or extraordinary nature". This paragraph is based on article 46, paragraph 28, of the 2003 United Nations Convention against Corruption.[615]

(27) Various interpretive notes or commentary with respect to comparable provisions in other treaties provide guidance as to the meaning of this provision. For example, the commentary to the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances provides:

> This rule makes for simplicity, avoiding the keeping of complex accounts, and rests on the notion that over a period of time there will be a rough balance between States that are sometimes the requesting and sometimes the requested party. In practice, however, that balance is not always maintained, as the flow of requests between particular pairs of parties may prove to be largely in one direction. For this reason, the concluding words of the first sentence enable the parties to agree to a departure from the general rule even in respect of ordinary costs.[616]

(28) A footnote to the 1990 United Nations Model Treaty on Mutual Assistance in Criminal Matters indicates that:

> For example, the requested State would meet the ordinary costs of fulfilling the request for assistance except that the requested State would bear (*a*) the exceptional

---

[612] See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 1; United Nations Convention against Transnational Organized Crime, art. 18, para. 10; A/55/383/Add.1, para. 39.

[613] See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 2; United Nations Convention against Transnational Organized Crime, art. 18, para. 11.

[614] See also International Convention for the Suppression of the Financing of Terrorism, art. 16, para. 3; United Nations Convention against Transnational Organized Crime, art. 18, para. 12.

[615] See also United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, art. 7, para. 19; United Nations Convention against Transnational Organized Crime, art. 18, para. 28; Model Treaty on Mutual Assistance in Criminal Matters, art. 19.

[616] *Commentary on the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, p. 198, para. 7.57.

> or extraordinary expenses required to fulfil the request, where required by the requested State and subject to previous consultations; (*b*) the expenses associated with conveying any person to or from the territory of the requested State, and any fees, allowances or expenses payable to that person while in the requesting State ... ; (*c*) the expenses associated with conveying custodial or escorting officers; and (*d*) the expenses involved in obtaining reports of experts.[617]

(29) An interpretative note to the 2000 United Nations Convention against Transnational Organized Crime states:

> The *travaux préparatoires* should indicate that many of the costs arising in connection with compliance with requests [regarding the transfer of persons or video conferencing] would generally be considered extraordinary in nature. Further, the *travaux préparatoires* should indicate the understanding that developing countries may encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.[618]

(30) Finally, according to the *travaux préparatoires* of the 2003 United Nations Convention against Corruption:

> Further, the *travaux préparatoires* will also indicate the understanding that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.[619]

---

[617] Model Treaty on Mutual Assistance in Criminal Matters, art. 19, footnote 124.

[618] A/55/383/Add.1, para. 43.

[619] Interpretative notes for the *Official Records (travaux preparatoires) of the negotiation of the United Nations Convention against Corruption* (A/58/422/Add.1), para. 44.

Chapter V
Provisional application of treaties

A. Introduction

47. At its sixty-fourth session (2012), the Commission decided to include the topic "Provisional application of treaties" in its programme of work and appointed Mr. Juan Manuel Gómez Robledo as Special Rapporteur for the topic.[620] In its resolution 67/92 of 14 December 2012, the General Assembly subsequently noted with appreciation the decision of the Commission to include the topic in its programme of work.

48. The Special Rapporteur has thus far submitted four reports,[621] which the Commission considered at its sixty-fifth to sixty-eighth sessions (2013-2016), respectively. The Commission has also had before it two memorandums, prepared by the Secretariat, at the sixty-fifth (2013) and sixty-seventh sessions (2015), respectively.[622]

49. On the basis of the draft guidelines proposed by the Special Rapporteur in the third and fourth reports, the Commission, at its sixty-eighth session (2016), took note of draft guidelines 1 to 4 and 6 to 9, as provisionally adopted by the Drafting Committee. Owing to a lack of time, it was decided to consider draft guidelines 5 and 10 at the next session.

B. Consideration of the topic at the present session

50. At its 3349th meeting, on 2 May 2017, the Commission decided to refer draft guidelines 1 to 4 and 6 to 9 back to the Drafting Committee with a view to completing a consolidated set of the draft guidelines that had already been provisionally adopted by the Committee.

51. At its 3357th and 3382nd meetings, on 12 May and 26 July 2017, respectively, the Commission provisionally adopted draft guidelines 1 to 11 , as presented by the Drafting Committee in its two reports on the topic at the present session (see section C.1 below).[623]

52. The working group established at the 3357th meeting, on 12 May 2017, to consider the draft commentaries to the draft guidelines on the provisional application of treaties held two meetings on 18 and 29 May 2017, respectively.

53. At its 3386th meeting, on 2 August 2017, the Commission adopted the commentaries to the draft guidelines provisionally adopted at the current session (see section C.2 below).

54. The Commission also had before it a further memorandum, prepared by the Secretariat, reviewing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, that provide for provisional application, including treaty actions related thereto.[624] The consideration of the memorandum was deferred to the next session of the Commission.

---

[620] *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 267.

[621] A/CN.4/664 (first report), A/CN.4/675 (second report), A/CN.4/687 (third report), and A/CN.4/699 and Add.1 (fourth report).

[622] A/CN.4/658 and A/CN.4/676.

[623] A/CN.4/L.895.

[624] A/CN.4/707.

C. Text of the draft guidelines on provisional application of treaties provisionally adopted so far by the Commission

1. Text of the draft guidelines

55. The text of the draft guidelines provisionally adopted so far by the Commission is reproduced below.

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Guideline 6
Legal effects of provisional application

The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Guideline 7
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Guideline 8
Termination upon notification of intention not to become a party

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

Guideline 9
Internal law of States or rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Guideline 10
Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Guideline 11
Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

2. Text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session

56. The text of the draft guidelines and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session is reproduced below.

Provisional application of treaties

General commentary

(1) The purpose of the draft guidelines is to provide assistance to States, international organizations and others concerning the law and practice on the provisional application of treaties.[625] They may encounter difficulties concerning, *inter alia*, the form of the agreement to provisionally apply a treaty or a part of a treaty, the commencement and

---

[625] As is always the case with the Commission's output, the draft guidelines are to be read together with the commentaries.

termination of such provisional application, and its legal effects. The objective of the draft guidelines is to direct States, international organizations and others to answers that are consistent with existing rules or to the solutions that seem most appropriate for contemporary practice.

(2) Although they are not legally binding as such, the draft guidelines reflect existing rules of international law. The draft guidelines are mainly based on article 25 of both the Vienna Convention on the Law of Treaties of 1969 (the "1969 Vienna Convention")[626] and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986 (the "1986 Vienna Convention"),[627] which they try to clarify and explain, and on the practice of States and international organizations on the matter, without prejudice to other rules of international law.

(3) It is of course impossible to address all the questions that may arise in practice and cover the myriad of situations that may be faced by States and international organizations. Yet, that is consistent with one of the main aims of the present draft guidelines, which is to keep the flexible nature of the provisional application of treaties[628] and to avoid any temptation to be overly prescriptive. Therefore, the draft guidelines allow States and international organizations to set aside, by mutual agreement, the practices addressed in certain draft guidelines if they decide otherwise.

(4) The draft guidelines should also help to promote the consistent use of terms and therefore avoid confusion. The extensive use of terms,[629] such as "provisional entry into force" as opposed to "definite entry into force", has led to confusion regarding the scope and the legal effects of the concept of the provisional application of treaties. In the same vein, quite frequently, treaties do not use the adjective "provisional", but speak instead of "temporary" or "interim" application.[630] Consequently, the framework of article 25 of the 1969 and 1986 Vienna Conventions, while it constitutes the legal basis of the matter,[631] has been criticized as difficult to understand[632] and lacking legal precision.[633] The intention of the present draft guidelines is to provide greater clarity in that regard.

(5) The purpose of provisional application is to give immediate effect to all or some of the provisions of a treaty without waiting for the completion of all domestic and international requirements for its entry into force.[634] It is a mechanism that allows States

---

[626] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[627] A/CONF.129/15 (not yet in force).

[628] See A/CN.4/664, paras. 28-30.

[629] In this regard, reference can be made to the analysis contained in *The Treaty, Protocols, Conventions and Supplementary Acts of the Economic Community of West African States (ECOWAS), 1975-2010* (Abuja, Ministry of Foreign Affairs of Nigeria), 2011, which is a collection of a total of 59 treaties concluded under the auspices of the Community. There it can be observed that of those 59 treaties, only 11 did not provide for provisional application (see A/CN.4/699, paras. 168-174).

[630] See paragraph 33 of the letter from the Federal Republic of Yugoslavia in the Exchange of Letters Constituting an Agreement between the United Nations and the Federal Republic of Yugoslavia on the Status of the Office of the United Nations High Commissioner for Human Rights in the Federal Republic of Yugoslavia (United Nations, *Treaty Series*, vol. 2042, No. 35283, p. 23, and *United Nations Juridical Yearbook 1998* (United Nations publication, Sales No. E.03.V.5), at p. 103); article 15 of the Agreement between Belarus and Ireland on the Conditions of Recuperation of Minor Citizens from the Republic of Belarus in Ireland (United Nations, *Treaty Series*, vol. 2679, No. 47597, p. 65, at p. 79); and article 16 of the Agreement between the Government of Malaysia and the United Nations Development Programme concerning the Establishment of the UNDP Global Shared Service Centre (*ibid.*, vol. 2794, No. 49154, p. 67). See the memorandums by the Secretariat on the origins of article 25 of the 1969 and 1986 Vienna Conventions (A/CN.4/658 and A/CN.4/676).

[631] See A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012), p. 22.

[632] See A. Geslin, *La mise en application provisoire des traités* (Paris, Editions A. Pedone, 2005), p. 111.

[633] See M.A. Rogoff and B.E. Gauditz, "The provisional application of international agreements", *Maine Law Review*, vol. 39 (1987), No. 1, p. 41.

[634] See D. Mathy, "Article 25", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), p. 640.

and international organizations to give legal effect to a treaty or a part of a treaty by applying its provisions in view of the necessity created by certain acts, events or situations before it has entered into force.[635] The concept has been defined as "the application of and binding adherence to a treaty's terms before its entry into force"[636] and as "a simplified form of obtaining the application of a treaty, or of certain provisions, for a limited period of time".[637] Provisional application serves a useful purpose, for example, when the subject matter entails a certain degree of urgency or when the negotiating States or international organizations want to build trust,[638] among other objectives.[639]

(6) An indicative bibliography is attached to these commentaries.*

Guideline 1
Scope

The present draft guidelines concern the provisional application of treaties.

Commentary

(1) Draft guideline 1 is concerned with the scope of application of the draft guidelines. In establishing the intended parameters of the draft guidelines, the provision should be read together with draft guideline 2, which sets out the purpose of the draft guidelines.

(2) The word "concern" was considered more suitable for a text aimed at providing guidance to States and international organizations than other formulations, such as "applies to", which is more frequently found in texts laying down rules applicable to States and other subjects of international law.

(3) The Commission decided not to include a further qualification limiting the scope *ratione personae* of the draft guidelines to States. Instead, the draft guidelines also pertain to international organizations, as is evident from the common reference to "State(s) or international organization(s)" in draft guidelines 5, 6, 7, 9,[640] 10 and 11. That accords with the fact that the provisional application of treaties is envisaged in article 25 of both the 1969[641] and the 1986 Vienna Conventions.[642]

---

[635] See Mertsch, *Provisionally Applied Treaties* (see footnote 631 above).

[636] R. Lefeber, "Treaties, provisional application", in *The Max Planck Encyclopedia of Public International Law*, vol. 10, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), p. 1.

[637] See M.E. Villager, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden and Boston, Martinus Nijhoff, 2009), p. 354.

[638] See H. Krieger, "Article 25", in *Vienna Convention on the Law of Treaties: A Commentary*, O. Dörr and K. Schmalenbach, eds. (Heidelberg and New York, Springer, 2012), p. 408.

[639] See A/CN.4/664, paras. 25-35.

* Forthcoming.

[640] The question of the potential role to be played by an international organization or an international conference in an agreement to provisionally apply a treaty or a part of a treaty is addressed in draft guideline 4.

[641] Article 25 of the 1969 Vienna Convention reads as follows:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty.

[642] Article 25 of the 1986 Vienna Convention reads as follows:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
>
> (a) the treaty itself so provides; or
>
> (b) the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have in some other manner so agreed.
>
> 2. Unless the treaty otherwise provides or the negotiating States and negotiating organizations or, as the case may be, the negotiating organizations have otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or an international organization

Guideline 2
Purpose

The purpose of the present draft guidelines is to provide guidance regarding the law and practice on the provisional application of treaties, on the basis of article 25 of the Vienna Convention on the Law of Treaties and other rules of international law.

Commentary

(1) Draft guideline 2 concerns the purpose of the draft guidelines and follows the practice of the Commission of including such types of provisions in its texts with a view to clarifying the purpose of the text in question. In the present case, the purpose of the draft guidelines is to provide guidance to States and international organizations regarding the law and practice on the provisional application of treaties.

(2) Draft guideline 2 is intended to underline that the guidelines are based on the 1969 Vienna Convention and other rules of international law, including the 1986 Vienna Convention.

(3) Draft guideline 2 serves to confirm the basic approach taken throughout the draft guidelines, namely that article 25 of the 1969 and the 1986 Vienna Conventions does not necessarily reflect all aspects of contemporary practice on the provisional application of treaties. That is suggested by the decision to include a reference to both "the law and practice" on the provisional application of treaties. Such an approach is also alluded to in the reference to "other rules of international law", which reflects the understanding within the Commission that other rules of international law, including those of a customary nature, may also be applicable to the provisional application of treaties.

(4) At the same time, notwithstanding the possibility of the existence of other rules and practice relating to the provisional application of treaties, the draft guidelines recognize the central importance of article 25 of the 1969 and the 1986 Vienna Conventions. The reference to "on the basis of", and the express reference to article 25, is intended to indicate that this article serves as the basic point of departure of the draft guidelines, even if it is to be supplemented by other rules of international law in order to obtain a full appreciation of the law applicable to the provisional application of treaties.

Guideline 3
General rule

A treaty or a part of a treaty may be provisionally applied, pending its entry into force between the States or international organizations concerned, if the treaty itself so provides, or if in some other manner it has been so agreed.

Commentary

(1) Draft guideline 3 states the general rule on the provisional application of treaties. In so doing, the Commission deliberately sought to follow the formulation of article 25 of the 1969 Vienna Convention, so as to underscore that the starting point for the draft guidelines is article 25. That is subject to the general understanding referred to in paragraph (3) of the commentary to draft guideline 2, namely that the 1969 and the 1986 Vienna Conventions do not necessarily reflect all aspects of contemporary practice on the provisional application of treaties.

(2) The opening phrase confirms the general possibility that a treaty, or a part of a treaty, may be provisionally applied. The formulation follows that found in the chapeau to paragraph 1 of article 25 of the 1969 and the 1986 Vienna Conventions, while it uses the word "may" to underline the optional character of provisional application. The Commission also considered how to best capture in the text the States or international organizations that could provisionally apply a treaty, and the States or international organizations whose

---

shall be terminated if that State or that organization notifies the States and organizations with regard to which the treaty is being applied provisionally of its intention not to become a party to the treaty.

agreement is required in order for such provisional application to take place, and therefore retained a more general formulation.

(3) Unlike in article 25, which alludes, in paragraph 1 (*b*), to an agreement to provisionally apply a treaty existing among "negotiating States" or "negotiating States and negotiating organizations", no reference is made in draft guideline 3 to which States or international organizations may provisionally apply a treaty. In the process of considering whether to align the present formulation with that found in article 25, by qualifying the applicability of the general rule to a particular group of States or international organizations, the Commission acknowledged the possibility, arising from contemporary practice, that provisional application may be undertaken by States or international organizations that are not negotiating States or negotiating organizations of the treaty in question. The question as to whether the term "negotiating States" in article 25, paragraph 1 (*b*), would prevent non-negotiating States or non-negotiating international organizations from entering into an agreement on provisional application could not be clearly answered based on the multilateral treaties taken into consideration.[643] Furthermore, the need to distinguish between different groups of States or international organizations, in terms of their connection with the treaty, was considered less apposite in the context of bilateral treaties, which constitute the vast majority of treaties that historically have been provisionally applied. However, relevant practice was identified by examining certain commodity agreements that had never entered into force but were extended beyond their termination date.[644] In such cases, when States extended an agreement that had only been provisionally applied, such an extension was also understood as applying to States that had acceded to the commodity agreement, thus demonstrating the belief that those States had also been provisionally applying the agreement.

(4) The distinction between provisional application of the entire treaty, as opposed to a "part" thereof, originates in article 25. The Commission, in its work on the law of treaties, specifically envisaged the possibility of what became known as provisional application of only a part of a treaty. In draft article 22, paragraph 2, of the 1966 draft articles on the law of treaties, the Commission confirmed that the "same rule" on what it then termed "provisional entry into force" applied to "part of a treaty".[645] In the corresponding commentary, it was explained that: "[n]o less frequent to-day is the practice of bringing into force provisionally only a certain part of a treaty in order to meet the immediate needs of the situation".[646] The Commission remains of the same view. The possibility of provisional application of only a part of a treaty also helps overcome the problems arising from certain types of provisions, such as operational clauses establishing treaty monitoring mechanisms, that may be less amenable to provisional application. The provisional application of a part of a treaty is accordingly reflected in the formula "provisional application of a treaty or a part of a treaty", which is used throughout the draft guidelines.[647]

---

[643] See A/CN.4/707, para. 37.

[644] See, for example, the International Tropical Timber Agreement, 1994 (United Nations, *Treaty Series*, vol. 1955, No. 33484, p. 81), which was extended several times on the basis of article 46 of the Agreement, during which time some States (Guatemala, Mexico, Nigeria and Poland) acceded to it. See also the case of Montenegro regarding Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention (*ibid.*, vol. 2677, No. 2889, p. 3, at p. 34). Montenegro, which became independent in 2006 and was therefore not a negotiating State, succeeded to the aforementioned treaty and had the option of provisionally applying certain provisions in accordance with the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force). For the declarations of provisional applications made by Albania, Belgium, Estonia, Germany, Liechtenstein, Luxembourg, the Netherlands, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland, see, *ibid.*, pp. 30-37.

[645] *Yearbook … 1966*, vol. II, para. 38.

[646] Paragraph (3) of the commentary to draft article 22, *ibid.*

[647] An example of the practice regarding the provisional application of a part of a treaty in bilateral treaties can be found in the Agreement between the Kingdom of the Netherlands and the Principality of Monaco on the Payment of Dutch Social Insurance Benefits in Monaco (*ibid.*, vol. 2205, No. 39160, p. 541, at p. 550, art. 13, para. 2); and examples of bilateral treaties expressly excluding a part

(5) The second phrase, namely "pending its entry into force between the States or international organizations concerned", is based on the chapeau of article 25. The Commission considered the possible ambiguity in the reference to "entry into force". While the expression could be referring, on the one hand, to the entry into force of a treaty itself,[648] examples exist of provisional application continuing for some States or international organizations after the entry into force of a treaty itself, when the treaty had not yet entered into force for those States and international organizations, as is the case for treaties in the multilateral context.[649] The reference to "entry into force" in draft guideline 3 is therefore to be understood in accordance with article 24 of the 1969 and 1986 Vienna Conventions on the same subject. It deals with both the entry into force of the treaty itself and the entry into force for each State or international organization concerned.

(6) The third and fourth phrases ("if the treaty so provides, or if in some other manner it has been so agreed") reflect the two possible bases for provisional application recognized in paragraph 1 (*a*) and (*b*) of article 25. The possibility of provisional application on the basis of a provision in the treaty in question is well established,[650] and hence the formulation follows that found in the 1969 and 1986 Vienna Conventions.

---

of a treaty from provisional application can be found in the Agreement between the Austrian Federal Government and the Government of the Federal Republic of Germany on the Cooperation of the Police Authorities and the Customs Administrations in the Border Areas (*ibid.*, vol. 2170, No. 38115, p. 573, at p. 586) and the Agreement between the Government of the Federal Republic of Germany and the Government of the Republic of Croatia regarding Technical Cooperation (*ibid.*, vol. 2306, No. 41129, p. 439). With respect to multilateral treaties, practice can be found in: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (*ibid.*, vol. 2056, No. 35597, p. 211, at p. 252); Convention on Cluster Munitions, (*ibid.*, vol. 2688, No. 47713, p. 39, at p. 112); Arms Trade Treaty (A/CONF.217/2013/L.3, art. 23); and the Document agreed among the States Parties to the Treaty on Conventional Armed Forces in Europe (ILM, vol. 36, p. 866, sect. VI, para. 1). Similarly, the Protocol on the Provisional Application of the Revised Treaty of Chaguaramas (*ibid.*, vol. 2259, No. 40269, p. 440) makes explicit which provisions of the Revised Treaty are not to be provisionally applied, while the Trans-Pacific Strategic Economic Partnership Agreement (*ibid.*, vol. 2592, No. 46151, p. 225) is an example of provisional application of a part of the treaty that applies only in respect of one party to the Agreement.

[648] As in the case of the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (*ibid.*, vol. 1836, No. 31364, p. 3) and in the Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force.

[649] For example, the Arms Trade Treaty.

[650] Examples in the bilateral sphere include: Agreement between the European Community and the Republic of Paraguay on Certain Aspects of Air Services (*Official Journal of the European Union* L 122, 11 May 2007), art. 9; Agreement between the Argentine Republic and the Republic of Suriname on Visa Waiver for Holders of Ordinary Passports (United Nations, *Treaty Series*, [vol. not published yet], No. 51407), art. 8; Treaty between the Swiss Confederation and the Principality of Liechtenstein relating to Environmental Taxes in the Principality of Liechtenstein (*ibid.*, vol. 2761, No. 48680, p. 23), art. 5; Agreement between the Kingdom of Spain and the Principality of Andorra on the Transfer and Management of Waste (*ibid.*, [vol. not published yet], No. 50313), art. 13; Agreement between the Government of the Kingdom of Spain and the Government of the Slovak Republic on Cooperation to Combat Organized Crime (*ibid.*, vol. 2098, No. 36475, p. 341), art. 14, para. 2; and Treaty on the Formation of an Association between the Russian Federation and the Republic of Belarus (*ibid.*, vol. 2120, No. 36926, p. 595), art. 19. Examples in the multilateral sphere include: Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, art. 7; Agreement on the Amendments to the Framework Agreement on the Sava River Basin and the Protocol on the Navigation Regime to the Framework Agreement on the Sava River Basin (*ibid.*, vol. 2367, No. 42662, p. 697), art. 3, para. 5; Framework Agreement on a Multilateral Nuclear Environmental Programme in the Russian Federation (*ibid.*, vol. 2265, No. 40358, p. 5, at pp. 13-14), art. 18, para. 7, and its corresponding Protocol on Claims, Legal Proceedings and Indemnification (*ibid.*, p. 35), art. 4, para. 8; Statutes of the Community of Portuguese-Speaking Countries (*ibid.*, vol. 2233, No. 39756, p. 207), art. 21; and Agreement establishing the "Karanta" Foundation for Support of Non-Formal Education Policies and Including in Annex the Statutes of the Foundation (*ibid.*, vol. 2341, No. 41941, p. 3), arts. 8 and 49, respectively.

(7) A modified, more general formulation was adopted for the alternative scenario of provisional application on the basis of a separate agreement. Unlike the 1969 and 1986 Vienna Conventions, no specific mention is made of a particular group of States or international organizations, acknowledging the contemporary practice that has included cases of provisional application being agreed to either by only some negotiating States or by non-negotiating States that subsequently signed or acceded to the treaty. Furthermore, the draft guideline envisages the possibility of a third State or international organization, completely unconnected to the treaty, provisionally applying it after having agreed in some other manner with one or more negotiating States or international organizations. That explains the more neutral drafting of draft guideline 3, in the passive form, which simply restates the basic rule.

(8) Draft guideline 3 should be read together with draft guideline 4, which provides further elaboration on provisional application by means of a separate agreement, thereby expanding on the meaning of agreement "in some other manner".

Guideline 4
Form of agreement

In addition to the case where the treaty so provides, the provisional application of a treaty or a part of a treaty may be agreed through:

(a) a separate treaty; or

(b) any other means or arrangements, including a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.

Commentary

(1) Draft guideline 4 deals with additional forms of agreement, on the basis of which a treaty, or a part of a treaty, may be provisionally applied, in addition to when the treaty itself so provides. The structure of the provision follows the sequence of article 25 of the 1969 and 1986 Vienna Conventions, which first envisages the possibility that the treaty in question might expressly permit provisional application and, second, provides for the possibility of an alternative basis for provisional application, when the States or the international organizations "in some other manner" so agreed, which typically occurs when the treaty is silent on the point.

(2) As previously indicated, draft guideline 4 elaborates on the reference to "in some other manner it has been so agreed" at the end of draft guideline 3, which is expressly envisaged in article 25, paragraph 1 (*b*). That is confirmed by the opening phrase "[i]n addition to the case where the treaty so provides", which is a direct reference to the phrase "if the treaty itself so provides" in draft guideline 3. That follows the language of article 25. Two categories of additional methods for agreeing the provisional application are identified in the subparagraphs.

(3) Subparagraph (*a*) envisages the possibility of provisional application by means of a separate treaty, which should be distinguished from the treaty that is provisionally applied.[651]

---

[651] Examples of bilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Agreement on the Taxation of Savings Income and the Provisional Application Thereof between the Netherlands and Germany (*ibid.*, [vol. not yet published], No. 49430) and the Amendment to the Agreement on Air Services between the Kingdom of the Netherlands and the State of Qatar (*ibid.*, vol. 2265, No. 40360, p. 507, at p. 511). The Netherlands has concluded a number of similar treaties. Examples of multilateral treaties on provisional application that are separate from the treaty that is provisionally applied include: Protocol on the Provisional Application of the Agreement establishing the Caribbean Community Climate Change Centre (*ibid.*, [vol. not yet published], No. 51181); Protocol on the Provisional Application of the

(4) Subparagraph (*b*) acknowledges the possibility that, in addition to a separate treaty, provisional application may also be agreed through "other means or arrangements", which broadens the range of possibilities for reaching agreement on provisional application. The Commission viewed such an additional reference as confirmation of the inherently flexible nature of provisional application.[652] By way of providing further guidance, reference is made to two examples of such "means or arrangements", namely provisional application agreed by means of a resolution adopted by an international organization or at an intergovernmental conference, or a declaration by a State or an international organization that is accepted by the other States or international organizations concerned.[653]

Revised Treaty of Chaguaramas; and the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force).

[652] In practice, some treaties were registered with the United Nations as having been provisionally applied, but with no indication as to which other means or arrangements had been employed to agree upon provisional application. The following are examples of such treaties: Agreement between the Kingdom of the Netherlands and the United States of America on the Status of United States Personnel in the Caribbean Part of the Kingdom (United Nations, *Treaty Series*, [vol. not yet published], No. 51578); Agreement between the Government of Latvia and the Government of the Republic of Azerbaijan on Cooperation in Combating Terrorism, Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors and Organized Crime (*ibid.*, vol. 2461, No. 44230, p. 205); and Agreement between the United Nations and the Government of the Republic of Kazakhstan relating to the Establishment of the Subregional Office for North and Central Asia of the United Nations Economic and Social Commission for Asia and the Pacific (*ibid.*, vol. 2761, No. 48688, p. 339). See R. Lefeber, "The provisional application of treaties", in *Essays on the Law of Treaties: A Collection of Essays in Honour of Bert Vierdag*, J. Klabbers and R. Lefeber, eds. (The Hague, Martinus Nihoff, 1998), p. 81.

[653] These are not agreements in which the international organization is a party to the treaty as such. Rather, these are agreements between States reached in meetings or conferences under the auspices of that international organization. Several such instances can be given. First, the amendments to the Convention on the International Maritime Satellite Organization (INMARSAT) and its Operating Agreement (United Nations, *Treaty Series*, vol. 1143, No. 17948, p. 105). See D. Sagar, "Provisional application in an international organization", *Journal of Space Law*, vol. 27, No. 2 (1999), pp. 99-116. Second, there are a number of precedents in which the competent organs of international organizations provisionally applied amendments, without explicit power being provided for in their constitutions, namely the Congress of the Universal Postal Union, the Committee of Ministers of the Council of Europe, and the practice of the International Telecommunication Union. See Sagar, "Provisional application in an international organization", pp. 104-106. Third, the amendment adopted in 2012 by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol to the United Nations Framework Convention on Climate Change (United Nations, *Treaty Series*, vol. 2303, No. 30822, p. 162), in which the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, in considering the gap in the operation of the clean development mechanism that might arise in relation to the entry into force of amendments to the Kyoto Protocol, recommended that those amendments could be provisionally applied. See "Legal considerations relating to a possible gap between the first and subsequent commitment periods" (FCCC/KP/AWG/2010/10), para. 18. Fourth, the Amendment to Article 14 of the Statutes of the World Tourism Organization (United Nations, *Treaty Series*, [vol. not published yet], No. 14403). Other examples, where Governments are given the possibility to bring the agreement provisionally into force by virtue of a collective decision, include: (a) International Agreement on Olive Oil and Table Olives (*ibid.*, vol. 2684, No. 47662, p. 63); (b) International Tropical Timber Agreement; (c) International Cocoa Agreement, 1993 (*ibid.*, vol. 1766, No. 30692, p. 3); and (d) International Cocoa Agreement, 2010 (*ibid.*, vol. 2871, No. 50115, p. 3). Lastly, a case that two academic sources qualify as one of provisional application refers to the establishment of the Preparatory Commission of the Comprehensive Nuclear-Test Ban Treaty Organization, which was done through the adoption of a resolution by the Meeting of States Signatories (CTBT/MSS/RES/1) on 19 November 1996. Although in the negotiations that led to the Comprehensive Nuclear-Test Ban Treaty Organization a proposal for provisional application was rejected, although the Comprehensive Nuclear-Test Ban Treaty has no explicit provision for provisional application, and although no separate treaty has been concluded to that effect, these scholars argue that because the decisions of the Preparatory Commission are intended to implement core provisions of the Comprehensive Nuclear-Test Ban Treaty before its entry into force, the resolution of the Meeting of States Signatories can be interpreted as evidence of an agreement "in some other manner", or of an "implied provisional application" on the basis of article 25, 1 (b) of the 1969 Vienna Convention. See A. Michie," The provisional application of arms

(5) While the practice is still quite exceptional,[654] the Commission was of the view that it was useful to include a reference to the possibility that a State or an international organization could make a declaration to the effect of provisionally applying a treaty or a part of a treaty, in cases where the treaty remains silent or when it is not otherwise agreed. However, the declaration must be clearly accepted by the other States or international organizations concerned, as opposed to mere non-objection. Most existing practice is reflected in acceptance expressed in written form. The draft guideline retains a certain degree of flexibility to allow for other modes of acceptance on the condition that it is expressed clearly. The Commission avoided the use of the word "unilateral" in order not to confuse the rules governing the provisional application of treaties with the legal regime of the unilateral acts of States.

Guideline 5
Commencement of provisional application

The provisional application of a treaty or a part of a treaty, pending its entry into force between the States or international organizations concerned, takes effect on such date, and in accordance with such conditions and procedures, as the treaty provides or as are otherwise agreed.

Commentary

(1) Draft guideline 5 deals with the commencement of provisional application. The draft guideline is modelled on article 24, paragraph 1, of the 1969 and 1986 Vienna Conventions, on entry into force.

(2) The first clause reflects the approach taken in the draft guidelines of referring to the provisional application of the entire treaty or a part of a treaty.

(3) The second clause has two components. The reference to "pending its entry into force" follows the formulation found in draft guideline 3, whereby "entry into force" refers to the entry into force between the States or international organizations concerned. As indicated in the commentary to draft guideline 3, such considerations are pertinent primarily in the context of the provisional application of multilateral treaties. The Commission decided to retain the general reference to "entry into force", as already indicated in the commentary to draft guideline 3.[655]

(4) The second component is the inclusion of the reference to both States and international organizations. That reflects the position taken by the Commission, referred to in paragraph (3) of the commentary to draft guideline 1, whereby the scope of the draft guidelines should include treaties between States and international organizations or between international organizations. The reference to entry into force "between" the States or international organizations was rendered in general terms in order to cover the variety of possible scenarios, including, for example, provisional application between a State or

---

control treaties", *Journal of Conflict and Security Law*, vol. 10, (2005), pp. 347-377, at pp. 369-370. See also, Y. Fukui, "CTBT: Legal questions arising from its non-entry into force revisited", *Journal of Conflict and Security Law* (forthcoming) pp. 1-18, at pp. 13-15. By contrast, another source, published under the auspices of the United Nations Institute for Disarmament Research and containing a preface by the Executive Secretary of the Preparatory Commission, maintains that the Comprehensive Nuclear-Test Ban Treaty is not currently being provisionally applied. See R. Johnson, *Unfinished Business: The Negotiation of the CTBT and the End of Nuclear Testing*, UNIDIR/2009/2 (2009), pp. 227-231.

[654] See the second report by the Special Rapporteur (A/CN.4/675), paras. 35 (c) and 36-41, and the third report by the Special Rapporteur (A/CN.4/687), paras. 5 and 120, on the provisional application by the Syrian Arab Republic of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (*United Nations Treaty Series, vol. 1974, No. 33757)*. See also the Protocol to the Agreement on a Unified Patent Court on Provisional Application (www.unified-patent-court.org/sites/default/files/Protocol_to_the_Agreement_on_Unified_Patent_Court_on_provisional_application.pdf).

[655] See paragraph (5) of the commentary to draft guideline 3.

international organization for which the treaty has entered into force and another State or international organization for which the treaty has not yet entered into force.

(5) The phrase "takes effect on such date, and in accordance with such conditions and procedures" concerns the triggering of the commencement of provisional application. The text is based on that adopted in article 68 of the 1969 Vienna Convention, which refers to "takes effect". The phrase confirms that what is being referred to is the legal effect in relation to the State or international organization electing to apply the treaty provisionally. The Commission decided not to refer expressly to the various modes of expressing consent to be bound by a treaty, in order to retain a more streamlined provision.

(6) The concluding phrase "as the treaty provides or as are otherwise agreed" confirms that the agreement to provisionally apply a treaty or a part of a treaty is based on a provision set forth in the treaty that is provisionally applied, on a separate treaty, whatever its particular designation, or on other means or arrangements that establish an agreement for provisional application, and is subject to the conditions and procedures established in such instruments.

Guideline 6
Legal effects of provisional application

> The provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States or international organizations concerned, unless the treaty provides otherwise or it is otherwise agreed.

Commentary

(1) Draft guideline 6 deals with the legal effects of provisional application. Two types of "legal effects" might be envisaged: the legal effects of the agreement to provisionally apply the treaty or a part of it, and the legal effects of the treaty or a part of it being provisionally applied. Without excluding the legal effects of the agreement to provisionally apply a treaty or a part thereof, draft guideline 6 relates to the legal effects of a treaty or a part of a treaty that is provisionally applied. A view was expressed that draft guideline 6 was too broadly drafted and instead should be written to state that the agreement to provisionally apply a treaty or a part of a treaty produces a legally binding obligation to apply that treaty or part thereof.

(2) The draft guideline commences by stating that the legal effect of provisional application of a treaty or a part of a treaty is to produce the same legal effects as if the treaty were in force between the States or international organizations concerned. In other words, a treaty or a part of a treaty that is provisionally applied is considered as binding on the parties provisionally applying it from the time at which the provisional application commenced. Such legal effect is derived from the agreement to provisionally apply the treaty by the States or the international organizations concerned, which may be expressed in the forms identified in draft guideline 4. In cases in which that agreement is silent on the legal effects of provisional application, which is common, the draft guideline provides for the same legal effects as if the treaty were in force.[656]

(3) The previous position is qualified by the concluding phrase "unless the treaty provides otherwise or it is otherwise agreed", which confirms that the basic rule is subject to the treaty, which may provide an alternative legal outcome. Such an understanding, namely a default in favour of the same legal effects as if the treaty were in force, subject to the possibility that the parties may agree otherwise, is reflected in existing State practice.[657]

---

[656] See Mathy, "Article 25" (footnote 634, above), p. 651.

[657] See the treaties analysed in the Memorandum by the Secretariat (A/CN.4/707), which contains an analysis of more than 400 bilateral and 40 multilateral treaties, while recognizing that in reality the number of both bilateral and multilateral treaties provisionally applied is higher than the number available in the United Nations *Treaty Series*; See also the examples contained in the reports submitted by the Special Rapporteur: A/CN.4/664, A/CN.4/675, A/CN.4/687 and A/CN.4/699 and

(4) The opening phrase "the provisional application of a treaty or a part of a treaty" follows draft guideline 5. The phrase "the same legal effects as if the treaty were in force", which is central to the draft guideline, alludes to the effects that the treaty would produce were it in force for the State or the international organization concerned. The reference to "between the States or international organizations concerned" was inserted in order to align the draft guideline with draft guideline 5. The concluding clause, "unless the treaty provides otherwise or it is otherwise agreed", indicates the condition on which the general rule is based, namely that the treaty does not provide otherwise.

(5) Nonetheless, an important distinction must be made. As a matter of principle, provisional application is not intended to give rise to the whole range of rights and obligations that derive from the consent by a State or an international organization to be bound by a treaty or a part of a treaty. Provisional application of treaties remains different from their entry into force, insofar as it is not subject to the same rules of the law of treaties in situations such as termination or suspension of the operation of treaties provided for in Part V, section 3, of the 1969 Vienna Convention. Instead, article 25, paragraph 2, allows for a very flexible way to terminate the provisional application of a treaty or a part of a treaty, without prejudice to the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied.

(6) The Commission considered the possibility of introducing an express safeguard so that the provisional application of a treaty could not result in the modification of the content of the treaty. However, the formulation adopted for draft guideline 6 was considered to be sufficiently comprehensive to deal with the point, since provisional application is limited to producing the same effects as if the treaty were in force. Implicit in the draft guideline, therefore, is the understanding that the act of provisionally applying the treaty does not affect the rights and obligations of other States or international organizations.[658] Furthermore, draft guideline 6 should not be understood as limiting the freedom of States or international organizations to amend or modify the treaty that is provisionally applied, in accordance with part IV of the 1969 and the 1986 Vienna Conventions.

Guideline 7
Responsibility for breach

The breach of an obligation arising under a treaty or a part of a treaty that is provisionally applied entails international responsibility in accordance with the applicable rules of international law.

Commentary

(1) Draft guideline 7 deals with the question of responsibility for breach of an obligation arising under a treaty or a part of a treaty that is being provisionally applied. It reflects the legal implication of the application of draft guideline 6. If the treaty or a part of a treaty being provisionally applied is considered as being legally binding, then a breach of an obligation arising under the treaty or a part of a treaty being provisionally applied would necessarily constitute a wrongful act giving rise to international responsibility. The Commission considered whether it was necessary to have a provision on responsibility at all. The inclusion of the present draft guideline was deemed necessary since it dealt with a key legal consequence of the provisional application of a treaty or a part of a treaty. Since article 73 of the 1969 Vienna Convention states that its provisions shall not prejudge any question that may arise in regard to a treaty from the international responsibility of a State and article 74 of the 1986 Vienna Convention provides similarly, the prevailing view was that the scope of the draft guidelines was not limited to that of the two Vienna Conventions, as stated in draft guideline 2.

Add.1. The latter contains an annex with examples of recent European Union practice on provisional application of agreements with third States.

[658] However, the subsequent practice of one or more parties to a treaty may provide a means of interpretation of the treaty under articles 31 or 32 of the 1969 Vienna Convention. See *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), chap. VI.

(2) The Commission decided to retain the reference to "a part" of a treaty in order to specify that when a part of a treaty is being provisionally applied, it is only that part that is susceptible to giving rise to international responsibility in case of a breach, as conceived under the present draft guideline.

(3) The draft guideline was aligned with the articles on responsibility of States for internationally wrongful acts of 2001[579] and with the articles on responsibility of international organizations of 2011,[580] to the extent that they reflect customary international law. Accordingly, the reference to "an obligation arising under" and the word "entails" were consciously drawn from those draft articles. Likewise, the concluding phrase "in accordance with the applicable rules of international law" is intended as a reference, *inter alia*, to those draft articles.

Guideline 8
Termination upon notification of intention not to become a party

Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty.

Commentary

(1) The provisional application of a treaty or a part of a treaty by a State or an international organization typically ceases in one of two instances: first, when the treaty enters into force for the State or international organization concerned or, second, when the intention not to become a party to the treaty is communicated by the State or international organization provisionally applying the treaty or a part of a treaty to the other States or international organizations between which the treaty or a part of a treaty is being provisionally applied.

(2) That the provisional application of a treaty or a part of a treaty can be terminated by means of the entry into force of the treaty itself is implicit in the reference in draft guideline 5 to "pending its entry into force".[581] In accordance with draft guideline 5, provisional application continues until the treaty enters into force for the State or international organization provisionally applying the treaty or a part of a treaty in relation to the other States or international organizations provisionally applying it or a part of such treaty as well.[582]

---

[579] *Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001.

[580] *Yearbook … 2011*, vol. II (Part Two), para. 87.

[581] Most bilateral treaties state that the treaty shall be provisionally applied "pending its entry into force", "pending its ratification", "pending the fulfilment of the formal requirements for its entry into force", "pending the completion of these internal procedures and the entry into force of this Convention", "pending the Governments … informing each other in writing that the formalities constitutionally required in their respective countries have been complied with", "until the fulfilment of all the procedures mentioned in paragraph 1 of this article" or "until its entry into force" (see A/CN.4/707, para. 90). That is also the case for multilateral treaties, such as the Madrid Agreement (Agreement on the Provisional Application of Certain Provisions of Protocol No. 14 Pending its Entry into Force), which provides in paragraph *(d)* that: "Such a declaration [of provisional application] will cease to be effective upon the entry into force of Protocol No. 14 *bis* to the Convention in respect of the High Contracting Party concerned."

[582] See, e.g., the Agreement between the Federal Republic of Germany and the Government of the Republic of Slovenia concerning the Inclusion in the Reserves of the Slovenian Office for Minimum Reserves of Petroleum and Petroleum Products of Supplies of Petroleum and Petroleum Products Stored in Germany on its Behalf (United Nations, *Treaty Series*, vol. 2169, No. 38039, p. 287, at p. 302); and the case in the Exchange of Notes Constituting an Agreement between the Government of Spain and the Government of Colombia on Free Visas (*ibid.*, vol. 2253, No. 20662, p. 328, at pp. 333-334).

(3) It was not feasible to reflect in a single formulation all the possible legal arrangements that might exist if the treaty has entered into force for the State or international organization provisionally applying a treaty or a part of a treaty, in relation to other States or international organizations provisionally applying the same treaty or a part thereof.

(4) Therefore, the Commission decided to limit the scope of draft guideline 8 to the second instance mentioned in paragraph (1) of the commentary to the present draft guideline — namely the case in which the State or international organization gives notice of its intention not to become a party to a treaty — thereby also following more closely the formulation of paragraph 2 of article 25 of the 1969 and 1986 Vienna Conventions. The provision was adopted without prejudice to other methods of terminating provisional application.[663]

(5) The formulation of draft guideline 8, in relation to that found in article 25 of the 1969 Vienna Convention, has been adapted to include international organizations within the scope of the draft guidelines.

(6) While the 1969 and 1986 Vienna Conventions envisage such an alternative agreement only being concluded between the "negotiating" States and, where applicable, international organizations, draft guideline 8 refers more generally to "or it is otherwise agreed". Such a formulation would continue to refer to the States or international organizations that had negotiated the treaty, but it may also include States and international organizations that were not involved in the negotiation of the treaty. Given the complexity of concluding modern multilateral treaties, it was not clear to the Commission that contemporary practice continued to support the narrow language of the Vienna Conventions, both in terms of whether all negotiating States or international organizations were to be treated as being on the same legal footing in relation to provisional application and out of recognition of the existence of other groups of States or international organizations whose agreement on matters related to the termination of provisional application might also be sought.[664]

(7) The Commission was also concerned with identifying which States or international organizations should be notified of another's intention to terminate the provisional application of a treaty or a part of a treaty. The final phrase in the draft guideline, "notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally", clarifies that point.[665]

---

[663] See, for example, article 29 of the 1978 Vienna Convention on Succession of States in Respect of Treaties (*ibid.*, vol. 1946, No. 33356, p. 3), which envisages additional means of terminating provisional application of multilateral treaties that are in force with respect to the territory to which the succession of States relates.

[664] Such an approach accords with that taken with regard to the position of negotiating States in draft guideline 3. See paragraphs (2) and (5) of the commentary to draft guideline 3, above.

[665] A small number of bilateral treaties contain explicit clauses on termination of provisional application and in some cases provide also for its notification. An example could be the Agreement between the Government of the United States of America and the Government of the Republic of the Marshall Islands concerning Cooperation to Suppress the Proliferation of Weapons of Mass Destruction, their Delivery Systems, and Related Materials by Sea (*ibid.*, [vol. not yet published], No. 51490, p. 14), art. 17. Other examples include: Treaty between the Federal Republic of Germany and the Kingdom of the Netherlands concerning the Implementation of Air Traffic Controls by the Federal Republic of Germany above Dutch Territory and concerning the Impact of the Civil Operations of Niederrhein Airport on the Territory of the Kingdom of the Netherlands (United Nations, *Treaty Series*, vol. 2389, No. 43165, p. 117, at p. 173); Agreement between Spain and the International Oil Pollution Compensation Fund (*ibid.*, vol. 2161, No. 37756, p. 45, at p. 50); and Treaty between the Kingdom of Spain and the North Atlantic Treaty Organization Represented by the Supreme Headquarters Allied Powers Europe on the Special Conditions Applicable to the Establishment and Operation on Spanish Territory of International Military Headquarters (*ibid.*, vol. 2156, No. 37662, p. 139, at p. 155). As for the termination of multilateral treaties, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (*ibid.*,

(8) The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying *mutatis mutandis* the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard.

Guideline 9

Internal law of States or rules of international organizations and observance of provisionally applied treaties

1. A State that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the provisions of its internal law as justification for its failure to perform an obligation arising under such provisional application.

2. An international organization that has agreed to the provisional application of a treaty or a part of a treaty may not invoke the rules of the organization as justification for its failure to perform an obligation arising under such provisional application.

Commentary

(1) Draft guideline 9 deals with the observance of provisionally applied treaties and their relation with the internal law of States and the rules of international organizations. Specifically, it deals with the question of the invocation of internal law of States, or in the case of international organizations the rules of the organization, as justification for failure to perform an obligation arising under the provisional application of a treaty or a part of a treaty. The first paragraph concerns the rule applicable to States and the second the rule applicable to international organizations.

(2) The provision follows closely the formulation contained in article 27 of both the 1969[666] and 1986[667] Vienna Conventions. Therefore, it should be considered together with those articles and other applicable rules of international law.

(3) The provisional application of a treaty or a part of a treaty is governed by international law. Like the general rule in article 27,[668] draft guideline 9 states that the provisional application of a treaty by a State or international organization cannot, as a general rule, depend on, or be conditioned by, their internal law or rules. Whatever the provisions of the internal law of a State or the internal rules of an international organization, they may not be invoked as a justification for failure to perform international

---

vol. 2167, No. 37924, p. 3, at p. 126), includes a clause (art. 41) allowing for termination by notification reflecting the wording of article 25, paragraph 2, of the 1969 Vienna Convention. Furthermore, the practice with regard to commodity agreements illustrates that provisional application may be agreed to be terminated by withdrawal from the agreement, as is the case with the International Agreement on Olive Oil and Table Olives.

[666] Art. 27 of the 1969 Vienna Convention provides as follows:

Internal law and observance of treaties

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

[667] Art. 27 of the 1986 Vienna Convention provides as follows:

Internal Law of States, Rules Of International Organizations And Observance Of Treaties

1. A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty.

2. An international organization party to a treaty may not invoke the rules of the organization as justification for its failure to perform the treaty.

3. The rules contained in the preceding paragraphs are without prejudice to article 46.

[668] See A. Schaus, "1969 Vienna Convention. Article 27: internal law and observance of treaties", in *The Vienna Conventions on the Law of Treaties. A Commentary*, vol. I, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 688-701, at p. 689.

obligations arising from the provisional application of a treaty or a part of a treaty. Likewise, such internal law or rules cannot be invoked so as to avoid the responsibility that may be incurred for the breach of such obligations.[669] However, as indicated in draft guideline 11, the States and international organizations concerned may agree to limitations deriving from such internal law or rules as a part of their agreement on provisional application.

(4) While it is true that each State or international organization may decide, under its internal law or rules, whether to agree to the provisional application of a treaty or a part of a treaty,[670] once a treaty or a part of a treaty is provisionally applied, an inconsistency with the internal law of a State or of the rules of an international organization cannot justify a failure to provisionally apply such a treaty or a part thereof. Consequently, the invocation of those internal provisions in an attempt to justify a failure to provisionally apply a treaty or a part thereof would not be in accordance with international law.

(5) A failure to comply with the obligations arising from the provisional application of a treaty or a part of a treaty with a justification based on the internal law of a State or rules of an international organization will engage the international responsibility of that State or international organization.[671] Any other view would be contrary to the law on State responsibility, according to which the characterization of an act of a State or an international organization as internationally wrongful is governed by international law and such characterization is not affected by its characterization as lawful by internal law.[672]

(6) The reference in the draft guideline to the "internal law of States or rules of international organizations" stands for any provision of this nature, and not only to the internal law or rules specifically concerning the provisional application of treaties.

(7) The phrase "obligation arising under such provisional application", in both paragraphs of the draft guideline, is broad enough to encompass situations where the obligation flows from the treaty itself or from a separate agreement to provisionally apply the treaty or a part of a treaty. This is in accordance with the general rule of draft guideline 6, which states that the provisional application of a treaty or a part of a treaty produces the same legal effects as if the treaty were in force between the States and the international organizations concerned.

Guideline 10
Provisions of internal law of States or rules of international organizations regarding competence to agree on the provisional application of treaties

1. A State may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of a provision of its internal law regarding competence to agree to the provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

2. An international organization may not invoke the fact that its consent to the provisional application of a treaty or a part of a treaty has been expressed in violation of the rules of the organization regarding competence to agree to the

---

[669] See article 7, "Obligatory character of treaties: the principle of the supremacy of international law over domestic law" in the fourth report by Sir Gerald Fitzmaurice, Special Rapporteur (*Yearbook … 1959*, vol. II, document A/CN.4/120, p. 43).

[670] See A.Q. Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Leiden, Brill, 2012), p. 64.

[671] See D. Mathy, "1969 Vienna Convention. Article 25: provisional application", in *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. I, O. Corten and P. Klein, eds. (Oxford, Oxford University Press, 2011), pp. 639-654, at p. 646.

[672] See article 3 of the draft articles on responsibility of States for internationally wrongful acts of 2001 (*Yearbook … 2001*, vol. II (Part Two) and corrigendum, para. 76, subsequently annexed to General Assembly resolution 56/83 of 12 December 2001); and draft article 5 of the draft articles on responsibility of international organizations of 2011 (*Yearbook … 2011*, vol. II (Part Two), para. 87, subsequently annexed to General Assembly resolution 66/100 of 9 December 2011).

provisional application of treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.

Commentary

(1) Draft guideline 10 deals with the effects of the provisions of the internal law of States and the rules of international organizations on their competence to agree to the provisional application of treaties. The first paragraph concerns the internal law of States and the second the rules of international organizations.

(2) Draft guideline 10 follows closely the formulation of article 46 of both the 1969 and 1986 Vienna Conventions. Specifically, the first paragraph of the draft guideline follows paragraph 1 of article 46 of the 1969 Vienna Convention,[673] and the second, paragraph 2 of article 46 of the 1986 Vienna Convention.[674] Therefore, the draft guideline should be considered together with those articles and other applicable rules of international law.

(3) Draft guideline 10 states that any claim that the consent to provisional application is invalid must be based on a manifest violation of the internal law of the State or the rules of the organization regarding their competence to agree to such provisional application and, additionally, must concern a rule of fundamental importance.

(4) A violation of that type is "manifest" if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States or, as the case may be, of international organizations and in good faith.[675]

Guideline 11
Agreement to provisional application with limitations deriving from internal law of States or rules of international organizations

The present draft guidelines are without prejudice to the right of a State or an international organization to agree in the treaty itself or otherwise to the provisional application of the treaty or a part of the treaty with limitations deriving from the internal law of the State or from the rules of the organization.

---

[673] Article 46 of the 1969 Vienna Convention provides as follows:

> **Provisions of internal law regarding competence to conclude treaties**
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

[674] Article 46 of the 1986 Vienna Convention provides as follows:

> **Provisions of internal law of a State and rules of an international organization regarding competence to conclude treaties**
>
> 1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
>
> 2. An international organization may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of the rules of the organization regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of fundamental importance.
>
> 3. A violation is manifest if it would be objectively evident to any State or any international organization conducting itself in the matter in accordance with the normal practice of States and, where appropriate, of international organizations and in good faith.

[675] According to art. 46, para. 2, of the 1969 Vienna Convention and art. 46, para. 3, of the 1986 Vienna Convention.

Commentary

(1) Draft guideline 11 relates to the limitations of States and international organizations that could derive from their internal law and rules when agreeing to the provisional application of a treaty or a part of a treaty. It acknowledges that such limitations may exist and, consequently, recognizes the right of States and international organizations to agree to provisional application subject to limitations that derive from internal law or rules of the organizations, and reflecting them in their consent to provisionally apply a treaty or a part of a treaty.

(2) Notwithstanding the fact that the provisional application of a treaty or part of a treaty may be subject to limitations, such as obtaining parliamentary consent, the present draft guideline recognizes the flexibility of a State or an international organization to agree to the provisional application of a treaty or a part of a treaty in such a manner as to guarantee that such an agreement conforms with the limitations deriving from their respective internal provisions. For example, the present draft guideline provides for the possibility that the treaty may expressly refer to the internal law of the State or the rules of the international organization or even make such provisional application conditional on the non-violation of the internal law of the State or the rules of the organization.[678]

(3) The word "agreement" in the title of the draft guideline reflects the consensual basis of the provisional application of treaties.

(4) The draft guideline should not be interpreted as implying the need for a separate agreement on the applicability of limitations deriving from the internal law of the State or the rules of the international organization concerned. The existence of any such limitations deriving from internal law needs only to be sufficiently clear in the treaty itself, the separate treaty or in any other form of agreement to provisionally apply a treaty or a part of a treaty.

(5) The present draft guideline should not be construed as encouraging States or international organizations to include in the agreement on provisional application limitations derived from the internal law of the State or from the rules of the organization.

---

[678] See, for example, art. 45 of the Energy Charter Treaty (United Nations, *Treaty Series*, vol. 2080, No. 36116, p. 95). See also the several examples of Free Trade Agreements between the European Free Trade Association (EFTA) States and other numerous States (i.e. Albania, Bosnia and Herzegovina, Canada, Chile, Egypt, Georgia, Lebanon, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Serbia, Singapore, the former Yugoslav Republic of Macedonia, Tunisia and the Central American States, the Gulf Cooperation Council Member States and the Southern African Custom Union States), where different clauses are used in this regard, such as: "if its constitutional requirements permit", "if its respective legal requirements permit" or "if their domestic requirements permit" (http://www.efta.int/free-trade/free-trade-agreements). For instance, article 43, paragraph 2, of the Free Trade Agreement between the EFTA States and the Southern African Custom Union States, reads as follows:

> Article 43 (Entry into force)
>
> […]
>
> 2. If its constitutional requirements permit, any EFTA State or SACU State may apply this Agreement provisionally. Provisional application of this Agreement under this paragraph shall be notified to the Depository.
>
> […]

Chapter VI
Protection of the atmosphere

A. Introduction

57. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the atmosphere" in its programme of work, subject to an understanding, and appointed Mr. Shinya Murase as Special Rapporteur.[677]

58. The Commission received and considered the first report of the Special Rapporteur at its sixty-sixth session (2014); the second report at its sixty-seventh session (2015); and the third report at its sixty-eighth session (2016).[678] On the basis of the draft guidelines proposed by the Special Rapporteur in the second and third reports, the Commission provisionally adopted eight draft guidelines and five preambular paragraphs, together with commentaries thereto.[679]

B. Consideration of the topic at the present session

59. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/705 and Corr.1). The Special Rapporteur analysed several key issues that he considered relevant to the topic, in particular, the interrelationship between international law on the protection of the atmosphere and other fields of international law, namely international trade and investment law, the law of the sea and international human rights law. The Special Rapporteur argued that the international law on the protection of the atmosphere existed as such and functioned in interrelationship with other relevant fields of international law, most notably international trade and investment law, the law of the sea and human rights law. Those fields of international law had intrinsic links with the law related to the protection of the atmosphere itself. Accordingly, there was a need to treat those fields in an integrated manner within the scope of the present topic. In view of the analysis, the Special Rapporteur proposed four additional draft guidelines on: the guiding principles on interrelationship (draft guideline 9); the interrelationship between the law on the protection of the atmosphere and international trade and investment law (draft guideline 10); the interrelationship of law on the protection of the atmosphere with the law of the sea (draft guideline 11); and the interrelationship of law on the protection of the atmosphere with human rights law (draft guideline 12).

---

[677] At its 3197th meeting, on 9 August 2013 (*Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10)), para. 168. The Commission included the topic in its programme of work on the understanding that: "(a) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights; (b) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to 'fill' gaps in the treaty regimes; (c) Questions relating to outer space, including its delimitation, are not part of the topic; (d) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein. The Special Rapporteur's reports would be based on such understanding." The General Assembly, in paragraph 6 of its resolution 68/112 of 16 December 2013, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its sixty-third session (2011), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 365).

[678] A/CN.4/667, A/CN.4/681 and Corr.1 (Chinese only), and A/CN.4/692, respectively.

[679] *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), paras. 53-54; and *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 95-96.

60. The Special Rapporteur indicated that in 2018 he expected to address: (a) implementation (at the level of national law); (b) compliance (at the level of international law); and (c) specific features of dispute settlement related to the law on the protection of the atmosphere. He also hoped to conclude the first reading of the draft guidelines.

61. The Commission considered the fourth report of the Special Rapporteur at its 3355th to 3359th meetings, on 10, 11, 12, 16 and 17 May 2017, respectively.

62. The debate in Plenary was preceded by a dialogue with scientists organized by the Special Rapporteur on 4 May 2017.[680] Members of the Commission found the dialogue and the contributions useful.

63. Following its debate on the report, the Commission, at its 3359th meeting, on 17 May 2017, decided to refer draft guidelines 9 to 11, as contained in the Special Rapporteur's fourth report, to the Drafting Committee, taking into account the debate in the Commission.

64. At its 3367th meeting, on 2 June 2017, the Commission considered the report of the Drafting Committee and provisionally adopted three preambular paragraphs and draft guideline 9 (see section C.1 below).

65. At its 3386th and 3387th meetings, on 2 and 3 August 2017, the Commission adopted the commentaries to the draft preambular paragraphs and draft guideline 9 provisionally adopted at the present session (see section C.2 below).

C. Text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission

1. Text of the draft guidelines, together with preambular paragraphs

66. The text of the draft guidelines on the protection of the atmosphere, together with preambular paragraphs, provisionally adopted so far by the Commission is reproduced below.

Preamble

…

Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems,

Bearing in mind that the transport and dispersion of polluting and degrading substances occur within the atmosphere,

Noting the close interaction between the atmosphere and the oceans,

Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole,

---

[680] The dialogue with scientists on the protection of the atmosphere was chaired by Mr. Shinya Murase, Special Rapporteur. The dialogue included the following presentations: "Overview: ocean and the atmosphere" by Mr. Øystein Hov, President of the Commission for Atmospheric Sciences, World Meteorological Organization; "Transboundary air pollution, the United Nations Economic Commission for Europe" by Mr. Peringe Grennfelt, former Chairperson of the Working Group on Effects, Convention on Long-range Transboundary Air Pollution, Economic Commission for Europe; "Linkages between the oceans and the atmosphere" by Mr. Tim Jickells, Co-Chairperson of Working Group 38 of the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection, World Meteorological Organization; and "Linking science with law for the protection of the atmosphere" by Mr. Arnold Kreilhuber, Head of the International Environmental Law Unit, Division of Environmental Law and Conventions, United Nations Environment Programme. The dialogue was followed by a question and answer session. The summary of the informal dialogue is available on the website of the Commission.

Aware of the special situation and needs of developing countries,

Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

Recalling that these draft guidelines are not to interfere with relevant political negotiations, including those on climate change, ozone depletion, and long-range transboundary air pollution, and that they also neither seek to "fill" gaps in treaty regimes nor impose on current treaty regimes legal rules or legal principles not already contained therein,

[Some other paragraphs may be added and the order of paragraphs may be coordinated at a later stage.]

…

Guideline 1
Use of terms

For the purposes of the present draft guidelines,

(a) "Atmosphere" means the envelope of gases surrounding the Earth;

(b) "Atmospheric pollution" means the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth's natural environment;

(c) "Atmospheric degradation" means the alteration by humans, directly or indirectly, of atmospheric conditions having significant deleterious effects of such a nature as to endanger human life and health and the Earth's natural environment.

Guideline 2[681]
Scope of the guidelines

1. The present draft guidelines [contain guiding principles relating to] [deal with] the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. The present draft guidelines do not deal with, but are without prejudice to, questions concerning the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, the liability of States and their nationals, and the transfer of funds and technology to developing countries, including intellectual property rights.

3. The present draft guidelines do not deal with specific substances, such as black carbon, tropospheric ozone and other dual-impact substances, which are the subject of negotiations among States.

4. Nothing in the present draft guidelines affects the status of airspace under international law nor questions related to outer space, including its delimitation.

Guideline 3
Obligation to protect the atmosphere

States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation.

---

[681] The alternative formulations in brackets will be subject to further consideration.

Guideline 4
Environmental impact assessment

States have the obligation to ensure that an environmental impact assessment is undertaken of proposed activities under their jurisdiction or control which are likely to cause significant adverse impact on the atmosphere in terms of atmospheric pollution or atmospheric degradation.

Guideline 5
Sustainable utilization of the atmosphere

1. Given that the atmosphere is a natural resource with a limited assimilation capacity, its utilization should be undertaken in a sustainable manner.

2. Sustainable utilization of the atmosphere includes the need to reconcile economic development with protection of the atmosphere.

Guideline 6
Equitable and reasonable utilization of the atmosphere

The atmosphere should be utilized in an equitable and reasonable manner, taking into account the interests of present and future generations.

Guideline 7
Intentional large-scale modification of the atmosphere

Activities aimed at intentional large-scale modification of the atmosphere should be conducted with prudence and caution, subject to any applicable rules of international law.

Guideline 8 [5][682]
International cooperation

1. States have the obligation to cooperate, as appropriate, with each other and with relevant international organizations for the protection of the atmosphere from atmospheric pollution and atmospheric degradation.

2. States should cooperate in further enhancing scientific knowledge relating to the causes and impacts of atmospheric pollution and atmospheric degradation. Cooperation could include exchange of information and joint monitoring.

Guideline 9
Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

---

[682] The draft guideline was renumbered at the sixty-eighth session. The original number appears in square brackets.

2. Text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session

67. The text of the draft guideline, together with preambular paragraphs, and commentaries thereto provisionally adopted by the Commission at its sixty-ninth session is reproduced below.

Preamble

…

Noting the close interaction between the atmosphere and the oceans,

…

Commentary

(1) This preambular paragraph acknowledges the "close interaction" that arises from, as a factual matter, the physical relationship between the atmosphere and the oceans. A significant proportion of the pollution of the marine environment from or through the atmosphere originates from land-based sources, including from anthropogenic activities on land.[683] Human activities are also responsible for global warming, which causes a rise in temperature of the oceans and in turn results in extreme atmospheric conditions of flood and drought.[684] In its resolution 71/257 of 23 December 2016, the General Assembly confirmed the effect of climate change on oceans and stressed the importance of increasing the scientific understanding of the oceans-atmosphere interface.[685]

(2) In 2015, the first Global Integrated Marine Assessment (first World Ocean Assessment) was completed as a comprehensive, in-depth study on the state of the marine environment including a chapter addressing in part the substances polluting the oceans from land-based sources through the atmosphere.[686] The summary of the report was approved by the General Assembly at its seventieth session.[687]

---

[683] R.A. Duce and others, "The atmospheric input of trace species to the world ocean", *Global Biogeochemical Cycles*, vol. 5, No. 3 (1991), pp. 193-259; T. Jickells and C.M. Moore, "The importance of atmospheric deposition for ocean productivity", *Annual Review of Ecology, Evolution, and Systematics*, vol. 46 (2015), pp. 481-501.

[684] According to the Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report: summary for policymakers", p. 4: "Ocean warming dominates the increase in energy stored in the climate system, accounting for more than 90% of the energy accumulated between 1971 and 2010 (*high confidence*), with only about 1% stored in the atmosphere. On a global scale, the ocean warming is largest near the surface, and the upper 75 m warmed by 0.11 [0.09 to 0.13] °C per decade over the period 1971 to 2010. It is *virtually certain* that the upper ocean (0-700 m) warmed from 1971 to 2010, and it *likely* warmed between the 1870s and 1971."

Because of the rise in ocean temperatures, many scientific analyses suggest risk of severe and widespread drought in the twenty-first century over many land areas. See S.K. Min and others, "Human contribution to more-intense precipitation extremes", *Nature*, vol. 470 (2011), pp. 378-381; A. Dai, "Increasing drought under global warming in observations and models", *Nature Climate Change*, vol. 3, No. 1 (2013), pp. 52-58; and J. Sheffield, E.F. Wood, and M.L. Roderick, "Little change in global drought over the past 60 years", *Nature*, vol. 491 (2012), pp. 435-438). See also Ø. Hov, "Overview: oceans and the atmosphere" and T. Jickells, "Linkages between the oceans and the atmosphere", in "Summary of the informal meeting of the International Law Commission: dialogue with atmospheric scientists (third session), 4 May 2017", paras. 4-12 and 21-30, respectively. Available from http://legal.un.org/docs/?path=../ilc/sessions/69/pdfs/english/informal_dialogue_4may2017.pdf&lang=E.

[685] General Assembly resolution 71/257 of 23 December 2016 on oceans and the law of the sea, paras. 185-196 and 279.

[686] United Nations Division for Ocean Affairs and the Law of the Sea, "First Global Integrated Marine Assessment (first World Ocean Assessment)". Available from http://www.un.org/depts/los/global_reporting/WOA_RegProcess.htm (accessed 7 July 2017) (see, in particular, chap. 20 on "Coastal, riverine and atmospheric inputs from land").

[687] General Assembly resolution 70/235 of 23 December 2015.

(3) Among the various human activities that have an impact on the oceans, greenhouse gas emissions from ships contribute to global warming and climate change. The 2009 study by the International Maritime Organization (IMO) on greenhouse gas emissions classified such emissions from ships into four categories, namely: emissions of exhaust gases, cargo emissions, emissions of refrigerants and other emissions.[688] Research indicates that excessive greenhouse gas emissions from ships change the composition of the atmosphere and climate, and cause a negative impact on the marine environment and human health.[689]

(4) The General Assembly has continued to emphasize the urgency of addressing the effects of atmospheric degradation, such as increases in global temperatures, sea-level rise, ocean acidification and the impact of other climate changes that are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States, and threatening the survival of many societies.[690]

(5) This preambular paragraph is linked to paragraph 1 of draft guideline 9 in the sense that the physical linkage that exists between the atmosphere and the oceans forms the physical basis of the interrelationship between the rules on the protection of the atmosphere and the rules of the law of the sea.[691]

Preamble

...

Aware also, in particular, of the special situation of low-lying coastal areas and small island developing States due to sea-level rise,

...

Commentary

(1) This preambular paragraph addresses one of the most profound impacts of atmospheric degradation, that is the sea-level rise caused by global warming. It draws particular attention to the special situation of low-lying coastal areas and small island developing States due to sea-level rise. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change estimates that the global mean sea-level rise is

---

[688] O. Buhaug and others, *Second IMO GHG Study 2009* (London, IMO, 2009), p. 23. See also T.W.P. Smith and others, *Third IMO GHG Study* (London, IMO, 2014), executive summary, table 1. M. Righi, J. Hendricks and R. Sausen, "The global impact of the transport sectors on atmospheric aerosol in 2030 — Part 1: land transport and shipping", *Atmospheric Chemistry and Physics*, vol. 15 (2015), pp. 633-651.

[689] Most of the greenhouse gas emissions from ships are emitted in or transported to the marine boundary layer where they affect atmospheric composition. See, e.g., V. Eyring and others, "Transport impacts on atmosphere and climate: shipping", *Atmospheric Environment*, vol. 44, No. 37 (2010), pp. 4735, 4744-4745 and 4752-4753. The Fifth Assessment Report of the Intergovernmental Panel on Climate Change asserted that greenhouse gas emissions have led to global ocean warming, the rise of ocean temperatures and ocean acidification (Intergovernmental Panel on Climate Change, "Climate change 2014 synthesis report", available from http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (accessed 7 July 2017), p. 40; D.E.J. Currie and K. Wowk, "Climate change and CO_2 in the oceans and global oceans governance", *Carbon and Climate Law Review*, vol. 3, No. 4 (2009), pp. 387 and 389; C. Schofield, "Shifting limits? Sea level rise and options to secure maritime jurisdictional claims" *Carbon and Climate Law Review*, vol. 3, No. 4 (2009), p. 12; and S.R. Cooley and J.T. Mathis, "Addressing ocean acidification as part of sustainable ocean development", *Ocean Yearbook*, vol. 27 (2013), pp. 29-47.

[690] General Assembly resolution 70/1 of 25 September 2015, Transforming our world: the 2030 Agenda for Sustainable Development, para. 14 ("Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries, including many least developed countries and small island developing States. The survival of many societies, and of the biological support systems of the planet, is at risk."). See also "Oceans and the law of the sea: report of the Secretary-General" (A/71/74/Add.1), chap. VIII ("Oceans and climate change and ocean acidification"), paras. 115-122.

[691] See paragraph (6) of the commentary to draft guideline 9 below.

likely to be between 26 cm and 98 cm by the year 2100.[692] While exact figures and rates of change still remain uncertain, the report states that it is "virtually certain" that sea levels will continue to rise during the 21st century, and for centuries beyond — even if the concentrations of greenhouse gas emissions are stabilized. Moreover, sea-level rise is likely to exhibit "a strong regional pattern, with some places experiencing significant deviations of local and regional sea level change from the global mean change".[693] That degree of change in sea levels may pose a potentially serious, maybe even disastrous, threat to many coastal areas, especially those with large, heavily populated and low-lying coastal areas, as well as to small island developing States.[694]

(2) This preambular paragraph is linked to the interrelationship between the rules of international law relating to the protection of the atmosphere and the rules of the law of the sea addressed in paragraph 1 of draft guideline 9.[695] This preambular paragraph is also linked to the special consideration to be given to persons and groups in vulnerable situations, which are referred to in paragraph 3 of draft guideline 9.[696] The words "in particular" are intended to acknowledge specific areas without necessarily limiting the list of potentially affected areas.

Preamble

…

Noting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account,

…

Commentary

(1) This preambular paragraph emphasizes the interests of future generations, including with a view to human rights protection. The goal is to ensure that the planet remains habitable for future generations. In taking measures to protect the atmosphere today, it is important to take into account the long-term conservation of the quality of the atmosphere. The Paris Agreement of 2015 on climate change, in its preamble, after acknowledging that climate change is a common concern of humankind, provides that parties should, when taking action to address climate change, respect, promote and consider, among other things, their respective obligations on human rights, as well as intergenerational equity.[697] The importance of "intergenerational" considerations was already expressed in principle 1 of the 1972 Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration).[698] It also underpins the concept of sustainable development, as

---

[692] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis. Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge, United Kingdom, Cambridge University Press, 2013), p. 1180.

[693] *Ibid.*, p. 1140.

[694] See A.H.A. Soons, "The effects of a rising sea level on maritime limits and boundaries", *Netherlands International Law Review*, vol. 37 No. 2 (1990), pp. 207-232; M. Hayashi, "Sea-level rise and the law of the sea: future options", in *The World Ocean in Globalisation: Challenges and Responses* (Leiden, Brill/Martinus Nijhoff, 2011), pp. 188 *et seq*. See also, International Law Association, *Report of the Seventy-fifth Conference held in Sofia, August 2012* (London, 2012), pp. 385-428; and International Law Association, *Johannesburg Conference (2016): International Law and Sea Level Rise* (interim report), pp. 13-18.

[695] See paragraph (6) of the commentary to draft guideline 9 below.

[696] See paragraph (16) of the commentary to draft guideline 9 below.

[697] Paris Agreement under the United Nations Framework Convention on Climate Change (Paris, 12 December 2015), document FCCC/CP/2015/10/Add.1, annex.

[698] See *Report of the United Nations Conference of the Human Environment, Stockholm 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. I. The Declaration was endorsed by the General Assembly in its resolution 2994 (XXVII) of 15 December 1972. Principle 1 of the Declaration referred to "solemn responsibility to protect and improve the environment for present and future generations".

formulated in the 1987 Brundtland Report, *Our Common Future*,[699] and informs the 2030 Agenda for Sustainable Development.[700] It is also reflected in the preamble of the Convention on Biodiversity of 1992,[701] and in other treaties.[702] Article 3, paragraph 1, of the United Nations Framework Convention on Climate Change of 1992 provides that: "Parties should protect the climate system for the benefit of present and future generations of humankind".[703] The International Court of Justice has noted, in its 1996 advisory opinion in the *Nuclear Weapons* case with respect to such weapons, the imperative to take into account "in particular their … ability to cause damage to generations to come".[704]

(2) The Commission opted for the term "interests" rather than "benefit" under the present preambular paragraph. A similar formulation was used in draft guideline 6 provisionally adopted by the Commission at its sixty-eighth session, which referred to the interests of future generations in the context of "equitable and reasonable utilization of the atmosphere".[705]

---

[699] Report of the World Commission on Environment and Development, *Our Common Future* (Oxford, Oxford University Press, 1987). It emphasized the importance of "development that meets the needs of the present without compromising the ability of future generations" (p. 43).

[700] General Assembly resolution 70/1 of 25 September 2015, which emphasizes the need to protect the planet from degradation so that it can "support the needs of present and future generations".

[701] Convention on Biological Diversity (United Nations, *Treaty Series*, vol. 1760, No. 30619, p. 79). The Preamble of the Convention provides for the "benefit of present and future generations" in conservation and sustainable use of biological diversity.

[702] Article 4 (vi) of the Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management (United Nations, *Treaty Series*, vol. 2153, No. 37605, p. 303) provides that parties shall "strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation".

[703] United Nations, *Treaty Series*, vol. 1771, No. 30822, p. 107, at p. 169.

[704] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, p. 226, at p. 244, para. 36.

[705] Though there are as yet no decisions by international tribunals concerning customary intergenerational rights, there have been many national court decisions, which may constitute practice for the purposes of customary international law, recognizing intergenerational equity, see C. Redgwell, "Intra- and inter-generational equity", in *The Oxford Handbook of International Climate Change Law*, C.P. Carlarne, K.R. Gray and R.G. Tarasofsky, eds. (Oxford, Oxford University Press, 2016), pp. 185-201, at p. 198. See also Australia: *Gray v. Minister for Planning*, [2006] NSWLEC 720; India: *Vellore Citizens' Welfare Forum and State of Tamil Nadu (joining) v. Union of India and others*, original public interest writ petition, 1996 5 SCR 241, ILDC 443 (IN 1996); Kenya: *Waweru, Mwangi (joining) and others (joining) v. Kenya*, miscellaneous civil application, Case No. 118 of 2004, Application No. 118/04, ILDC 880 (KE 2006); South Africa: *Fuel Retailers Association of South Africa v. Director-General, Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and others*, [2007] ZACC 13, 10 BCLR 1059; Pakistan: *Rabab Ali v. Federation of Pakistan*, petition filed 6 April 2016 (summary available at www.ourchildrenstrust.org/pakistan). For commentary, see E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo, United Nations University Press, 1989), p. 96; M. Bruce, "Institutional aspects of a charter of the rights of future generations", in *Our Responsibilities Towards Future Generations*, S. Busuttil and others, eds. (Valetta, UNESCO and Foundation for International Studies, University of Malta, 1990), pp. 127-131; T. Allen, "The Philippine children's case: recognizing legal standing for future generations", *Georgetown International Environmental Law Review*, vol. 6 (1994), pp. 713-741 (referring to the judgment of the Philippine Supreme Court in *Minors Oposa et al. v. Factoran* (30 July 1993), ILM, vol. 33 (1994), p. 168). Standing to sue in some proceedings was granted on the basis of the "public trust doctrine", which holds governments accountable as trustees for the management of common environmental resources. See M.C. Wood and C.W. Woodward IV, "Atmospheric trust litigation and the constitutional right to a healthy climate system: judicial recognition at last", *Washington Journal of Environmental Law and Policy*, vol. 6 (2016), pp. 634-684; C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester, Manchester University Press, 1999); K. Coghill, C. Sampford and T. Smith, eds., *Fiduciary Duty and the Atmospheric Trust* (London, Routledge, 2012); M.C. Blumm and M.C. Wood, *The Public Trust Doctrine in Environmental and Natural Resources Law*, 2nd ed. (Durham, North Carolina, Carolina Academic Press, 2015); and K. Bosselmann, *Earth Governance: Trusteeship of the Global Commons* (Cheltenham, Edward Elgar Publishing, 2015). In a judgment on 13 December 1996, the Indian Supreme Court declared the public trust doctrine "the law

Guideline 9
Interrelationship among relevant rules

1. The rules of international law relating to the protection of the atmosphere and other relevant rules of international law, including *inter alia* the rules of international trade and investment law, of the law of the sea and of international human rights law, should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law.

2. States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner.

3. When applying paragraphs 1 and 2, special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation. Such groups may include, *inter alia*, indigenous peoples, people of the least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise.

Commentary

(1) Draft guideline 9 addresses "interrelationship among relevant rules"[786] and seeks to reflect the relationship between rules of international law relating to the protection of the atmosphere and other relevant rules of international law. Paragraphs 1 and 2 are general in nature, while paragraph 3 places emphasis on the protection of groups that are particularly vulnerable to atmospheric pollution and atmospheric degradation. Atmospheric pollution and atmospheric degradation are defined in draft guideline 1 on the use of terms. Those terms focus on pollution and degradation caused "by humans". That necessarily means that human activities governed by other fields of law have a bearing on the atmosphere and its protection. It is therefore important that conflicts and tensions between rules relating to the protection of the atmosphere and rules relating to other fields of international law are to the extent possible avoided. Accordingly, draft guideline 9 highlights the various techniques in international law for addressing tensions between legal rules and principles, whether they relate to a matter of interpretation or a matter of conflict. The formulation of draft guideline 9 draws upon the conclusions reached by the Commission's Study Group on fragmentation of international law: difficulties arising from the diversification and expansion of international law.[787]

(2) Paragraph 1 addresses three kinds of legal processes, namely the identification of the relevant rules, their interpretation and their application. The phrase "and with a view to avoiding conflicts" at the end of the first sentence of the paragraph signals that "avoiding conflicts" is among one of the principal purposes of the paragraph. It is, however, not the exclusive purpose of the draft guideline. The paragraph is formulated in the passive form,

---

of the land". *M.C. Mehta v. Kamal Nath and Others*, (1997) 1 Supreme Court Cases 388, reprinted in C.O. Okidi, ed., *Compendium of Judicial Decisions in Matters Related to the Environment: National Decisions*, vol. I (Nairobi, United Nations Environment Programme/United Nations Development Programme, 1998), p. 259. See J. Razzaque, "Application of public trust doctrine in Indian environmental cases", *Journal of Environmental Law*, vol. 13, No. 2 (2001), pp. 221-234.

[786] See draft article 10 (on interrelationship) of resolution 2/2014 on the declaration of legal principles relating to climate change of the International Law Association, *Report of the Seventy-sixth Conference held in Washington D.C., August 2014* (London, 2014), p. 26.

[787] *Yearbook … 2006*, vol. II (Part Two), para. 251. See conclusion (2) on "relationships of interpretation" and "relationships of conflict". See, for the analytical study, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1).

in recognition of the fact that the process of identification, interpretation and application involves not only States but also international organizations, as appropriate.

(3) The phrase "should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations" draws upon the Commission's Study Group conclusions on fragmentation. The term "identified" is particularly relevant in relation to rules arising from treaty obligations and other sources of international law. In coordinating norms, certain preliminary steps need to be taken that pertain to identification, for example, a determination of whether two norms address "the same subject matter", and which norm should be considered *lex generalis* or *lex specialis* and *lex anterior* or *lex posterior*, and whether the *pacta tertiis* rule applies. Moreover, when resorting to rules of customary international law for the purposes of interpretation, identification of customary international law itself is considered a prerequisite.

(4) The first sentence also makes specific reference to the principles of "harmonization and systemic integration", which were accorded particular attention in the conclusions of the work of the Study Group. As noted in conclusion (4) on harmonization, when several norms bear on a single issue they should, to the extent possible, be interpreted so as give rise to "a single set of compatible obligations". Moreover, under conclusion (17), systemic integration denotes that "whatever their subject matter, treaties are a creation of the international legal system". They should thus be interpreted against the background of other international rules and principles.

(5) The second sentence of paragraph 1 seeks to locate the paragraph within the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969,[708] including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law. Article 31, paragraph 3 (c), is intended to guarantee a "systemic interpretation", requiring "any relevant rules of international law applicable in the relations between the parties" to be taken into account.[709] In other words, article 31, paragraph 3 (c), of the 1969 Vienna Convention emphasizes both the "unity of international law" and "the sense in which rules should not be considered in isolation of general international law".[710] Article 30 of the 1969 Vienna Convention provides rules to resolve a conflict, if the above principle of systemic integration does not work effectively in a given circumstance. Article 30 provides for conflict rules of *lex specialis* (paragraph 2), of *lex posterior* (paragraph 3) and of *pacta tertiis* (paragraph 4).[711] The phrase "principles and rules of customary international law" in the second sentence of paragraph 1 covers such principles and rules of customary international law as are relevant to the identification, interpretation and application of relevant rules.[712]

(6) The reference to "including *inter alia* the rules of international trade and investment law, of the law of the sea and of international human rights law" highlights the practical importance of these three areas in their relation to the protection of the atmosphere. The specified areas have close connections with the rules of international law relating to the

---

[708] United Nations, *Treaty Series*, vol. 1155, No. 18232, p. 331.

[709] See, e.g., WTO, Appellate Body report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 6 November 1998, para. 158. See also *Al-Adsani v. the United Kingdom*, Application No. 35763/97, ECHR 2001-XI, para. 55.

[710] P. Sands, "Treaty, custom and the cross-fertilization of international law", *Yale Human Rights and Development Law Journal*, vol. 1 (1998), p. 95, para. 25; C. McLachlan, "The principle of systemic integration and article 31 (3) (c) of the Vienna Convention", *International and Comparative Law Quarterly*, vol. 54 (2005), p. 279; O. Corten and P. Klein, eds., *The Vienna Conventions on the Law of Treaties: A Commentary*, vol. 1 (Oxford, Oxford University Press, 2011), pp. 828-829.

[711] *Ibid.*, pp. 791-798.

[712] It may be noted that the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Marrakesh Agreement establishing the World Trade Organization, United Nations, *Treaty Series*, vol. 1869, No. 31874, p. 3, annex 2, p. 401) provides in art. 3, para. 2, that "[t]he dispute settlement system of the WTO ... serves ... to clarify the existing provisions of those [covered] agreements in accordance with *customary* rules of interpretation of public international law" (emphasis added).

protection of the atmosphere in terms of treaty practice, jurisprudence and doctrine.[713] Other fields of law, which might be equally relevant, have not been overlooked and the list of relevant fields of law is not intended to be exhaustive. Furthermore, nothing in draft guideline 9 should be interpreted as subordinating rules of international law in the listed fields to rules relating to the protection of the atmosphere and vice-versa.

(7) With respect to international trade law, the concept of mutual supportiveness has emerged to help reconcile that law and international environmental law, which relates in part to protection of the atmosphere. The Marrakesh Agreement establishing the World Trade Organization[714] (WTO) of 1994 provides, in its preamble, that its aim is to reconcile trade and development goals with environmental needs "in accordance with the objective of sustainable development".[715] The WTO Committee on Trade and Environment began pursuing its activities "with the aim of making international trade and environmental policies mutually supportive",[716] and in its 1996 report to the Singapore Ministerial Conference, the Committee reiterated its position that the WTO system and environmental protection are "two areas of policy-making [that] are both important and … should be mutually supportive in order to promote sustainable development".[717] As the concept of "mutual supportiveness" has become gradually regarded as "a legal standard *internal* to the WTO",[718] the 2001 Doha Ministerial Declaration expresses the conviction of States that "acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive".[719] Mutual supportiveness is considered in international trade law as part of the principle of harmonization in interpreting conflicting rules of different treaties. Among a number of relevant WTO dispute settlement cases, the *United States — Standards for Reformulated and Conventional Gasoline* case in 1996 is most notable in that the Appellate Body refused to separate the rules of the General Agreement on Tariffs and Trade (GATT 1994) from other rules of interpretation in public international law, by stating that "the *General Agreement* is not to be read *in clinical isolation from public international law*"(emphasis added),[720] strongly supporting the interpretative principle of harmonization and systemic integration.

(8) Similar trends and approaches appear in international investment law. Free trade agreements, which contain a number of investment clauses, such as the North American

---

[713] See International Law Association, *Report of the Seventy-sixth Conference held in Washington* (footnote 706 above); and A. Boyle, "Relationship between international environmental law and other branches of international law", in *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunée and E. Hey, eds. (Oxford, Oxford University Press, 2007), pp. 125-146.

[714] United Nations, *Treaty Series*, vols. 1867-1869, No. 31874.

[715] *Ibid.*, vol. 1867, No. 31874, p. 154.

[716] Trade Negotiations Committee, decision of 14 April 1994, MTN.TNC/45(MIN), annex II, p. 17.

[717] WTO, Committee on Trade and Environment, Report (1996), WT/CTE/1 (12 November 1996), para. 167.

[718] J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge, United Kingdom, Cambridge University Press, 2003); R. Pavoni, "Mutual supportiveness as a principle of interpretation and law-making: a watershed for the 'WTO-and-competing regimes' debate?", *European Journal of International Law*, vol. 21, No. 3 (2010), pp. 651-652. See also S. Murase, "Perspectives from international economic law on transnational environmental issues", *Collected Courses of The Hague Academy of International Law*, vol. 253 (Leiden, Martinus Nijhoff, 1996), pp. 283-431, reproduced in S. Murase, *International Law: An Integrative Perspective on Transboundary Issues* (Tokyo, Sophia University Press, 2011), pp. 1-127; and S. Murase, "Conflict of international regimes: trade and the environment", *ibid.*, pp. 130-166.

[719] Adopted on 14 November 2001 at the fourth session of the WTO Ministerial Conference in Doha, WT/MIN(01)/DEC/1, para. 6. The Hong Kong Ministerial Declaration of 2005 reaffirmed that "the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of trade and environment …" (adopted on 18 December 2005 at the sixth session of the Ministerial Conference in Hong Kong, China, WT/MIN(05)/DEC, para. 31).

[720] WTO, Appellate Body report, *Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, p. 17. See also S. Murase, "Unilateral measures and the WTO dispute settlement" (discussing the *Gasoline* case), in *Asian Dragons and Green Trade: Environment, Economics and International Law*, S.C. Tay and D.C. Esty, eds. (Singapore, Times Academic Press, 1996), pp. 137-144.

Free Trade Agreement,[721] and numerous bilateral investment treaties[722] also contain standards relating to the environment, which has been confirmed by the jurisprudence of the relevant dispute settlement bodies. Some investment tribunals have emphasized that investment treaties "cannot be read and interpreted in isolation from public international law".[723]

(9) The same is the case with the law of the sea. The protection of the atmosphere is intrinsically linked to the oceans and the law of the sea owing to the close physical interaction between the atmosphere and the oceans. The Paris Agreement notes in its preamble "the importance of ensuring the integrity of all ecosystems, including oceans". This link is also borne out by the United Nations Convention on the Law of the Sea of 1982,[724] which defines the "pollution of the marine environment", in article 1, paragraph 1 (4), in such a way as to include all airborne sources of marine pollution, including atmospheric pollution from land-based sources and vessels.[725] It offers detailed provisions on the protection and preservation of the marine environment through Part XII, in particular articles 192, 194, 207, 211 and 212. There are a number of regional conventions regulating marine pollution from land-based sources.[726] IMO has sought to regulate vessel-source pollution in its efforts to supplement the provisions of the Convention[727] and to combat

---

[721] North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (Washington D.C., United States Government Printing Office, 1993). Note, in particular, arts. 104, para. 1, and 1114.

[722] There are various model bilateral investment treaties (BITs), such as: Canada Model BIT of 2004, available at www.italaw.com/documents/Canadian2004-FIPA-model-en.pdf; Colombia Model BIT of 2007, available at www.italaw.com/documents/inv_model_bit_colombia.pdf; United States Model BIT of 2012, available at www.italaw.com/sites/default/files/archive/ita1028.pdf; Model International Agreement on Investment for Sustainable Development of the International Institute for Sustainable Development (IISD) of 2005, in H. Mann and others, *IISD Model International Agreement on Investment for Sustainable Development*, 2nd ed. (Winnipeg, 2005), art. 34, available from www.iisd.org/pdf/2005/investment_model_int_agreement.pdf. See also United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development* (2015), pp. 91-121, available at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf; P. Muchlinski, "Negotiating new generation international investment agreements: new sustainable development-oriented initiatives", in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, S. Hindelang and M. Krajewski, eds., (Oxford: Oxford University Press, 2016), pp. 41-64.

[723] *Phoenix Action Ltd. v. the Czech Republic*, ICSID Case No. ARB/06/5, award, 15 April 2009, para. 78.

[724] United Nations, *Treaty Series*, vol. 1833, No. 31363, p. 3. Prior to the Convention, the only international instrument of significance was the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water (*ibid.*, vol. 480, p. 43).

[725] M.H. Nordquist and others, eds., *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (Dordrecht, Martinus Nijhoff, 1991), pp. 41-42.

[726] For example, the Convention for the Protection of the Marine Environment of the North-East Atlantic (United Nations, *Treaty Series*, No. 42279, p. 67, at p. 71, art. 1 (e)); the Convention on the Protection of the Marine Environment of the Baltic Sea Area (*ibid.*, vol. 1507, No. 25986, p. 166, at p. 169, art. 2, para. 2); the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (*ibid.*, vol. 1328, No. 22281, p. 105, at p. 121, art. 4, para. 1 (b)); the Protocol for the Protection of the South-East Pacific against Pollution from Land-based Sources (*ibid.*, vol. 1648, No. 28327, p. 73, at p. 90, art. II (c)); and the Protocol for the Protection of the Marine Environment against Pollution from Land-based Sources to the Kuwait Regional Convention for Co-operation on the Protection of the Marine Environment from Pollution (*ibid.*, vol. 2399, No. 17898, p. 3, at p. 40, art. III).

[727] For example, at the fifty-eighth session of the Marine Environment Protection Committee in 2008, IMO adopted annex VI, as amended, to the International Convention for the Prevention of Pollution from Ships (*ibid.*, vol. 1340, No. 22484, p. 61), which regulates, *inter alia*, emissions of SO_x and NO_x. The Convention now has six annexes, namely, annex I on regulations for the prevention of pollution by oil (entry into force on 2 October 1983); annex II on regulations for the control of pollution by noxious liquid substances in bulk (entry into force on 6 April 1987); annex III on regulations for the prevention of pollution by harmful substances carried by sea in packaged form (entry into force on 1 July 1992); annex IV on regulations for the prevention of pollution by sewage from ships (entry into force on 27 September 2003); annex V on regulations for the prevention of

climate change.[728] The effective implementation of the applicable rules of the law of the sea could help to protect the atmosphere. Similarly, the effective implementation of the rules on the protection of the environment could protect the oceans.

(10) As for international human rights law, environmental degradation, including air pollution, climate change and ozone layer depletion, "has the potential to affect the realization of human rights".[729] The link between human rights and the environment, including the atmosphere, is acknowledged in the practice. The Stockholm Declaration recognizes, in its principle 1, that everyone "has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and well-being".[730] The Rio Declaration on Environment and Development of 1992 outlines, in its principle 1, that "[h]uman beings are at the centre of concerns for sustainable development", and that "[t]hey are entitled to a healthy and productive life in harmony with nature".[731] In the context of atmospheric pollution, the Convention on Long-range Transboundary Air Pollution recognizes that air pollution has "deleterious effects of such a nature as to endanger human health" and provides that the parties are determined "to protect man and his environment against air pollution" of a certain magnitude.[732] Likewise, for atmospheric degradation, the Vienna Convention for the Protection of the Ozone Layer contains a provision whereby the parties are required to take appropriate measures "to protect human health" in accordance with the Convention and Protocols to which they are a party.[733] Similarly, the United Nations Framework Convention on Climate Change deals with the adverse effects of climate change, including significant deleterious effects "on human health and welfare".[734]

(11) In this regard, relevant human rights are "the right to life",[735] "the right to private and family life"[736] and "the right to property".[737] Where a specific right to environment

---

pollution by garbage from ships (entry into force on 31 December 1988); and annex VI on regulations for the prevention of air pollution from ships (entry into force on 19 May 2005).

[728] S. Karim, *Prevention of Pollution of the Marine Environment from Vessels: The Potential and Limits of the International Maritime Organization* (Dordrecht, Springer, 2015), pp. 107-126; S. Karim and S. Alam, "Climate change and reduction of emissions of greenhouse gases from ships: an appraisal", *Asian Journal of International Law*, vol. 1, No. 1 (2011), pp. 131-148; Y. Shi, "Are greenhouse gas emissions from international shipping a type of marine pollution?" *Marine Pollution Bulletin*, vol. 113, Nos. 1-2 (2016), pp. 187-192; J. Harrison, "Recent developments and continuing challenges in the regulation of greenhouse gas emissions from international shipping" (2012), Edinburgh School of Law Research Paper No. 2012/12, p. 20. Available from https://ssrn.com/abstract=2037038 (accessed 7 July 2017).

[729] Analytical study on the relationship between human rights and the environment: report of the United Nations High Commissioner for Human Rights (A/HRC/19/34), para. 15. See also Human Rights Council resolution 19/10 of 19 April 2012 on human rights and the environment (A/HRC/RES/19/10).

[730] See *Report of the United Nations Conference of the Human Environment, Stockholm 5-16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), chap. I; and L.B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, vol. 14 (1973), pp. 423-515, at pp. 451-455.

[731] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I, principle 1; and F. Francioni, "Principle 1: human beings and the environment", in *The Rio Declaration on Environment and Development: A Commentary*, J.E. Viñuales, ed. (Oxford, Oxford University Press, 2015), pp. 93-106, at pp. 97-98.

[732] United Nations, *Treaty Series*, vol. 1302, No. 21623, p. 217, at p. 219, arts. 1 and 2.

[733] *Ibid.*, vol. 1513, No. 26164, p. 293, at p. 326, art. 2.

[734] Art. 1.

[735] Art. 6 of the International Covenant on Civil and Political Rights of 1966 (United Nations, *Treaty Series*, vol. 999, No. 14668, p. 171); art. 6 of the Convention on the Rights of the Child of 1989 (*ibid.*, vol. 1577, No. 27531, p. 3); art. 10 of the Convention on the Rights of Persons with Disabilities of 2006 (*ibid.*, vol. 2515, No. 44910, p. 3); art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (*ibid.*, vol. 213, No. 2889, p. 221, hereinafter, "European Convention on Human Rights"); art. 4 of the American Convention on Human Rights of 1969 (*ibid.*, vol. 1144, No. 14668, p. 171); and art. 4 of the African Charter on Human and Peoples' Rights of 1981 (*ibid.*, vol. 1520, No. 26363, p. 217).

exists in human rights conventions, the relevant courts and treaty bodies apply them, including the right to health. In order for international human rights law to contribute to the protection of the atmosphere, however, certain core requirements must be fulfilled.[738] First, as international human rights law remains "a personal-injury-based legal system",[739] a direct link between atmospheric pollution or degradation that impairs the protected right and an impairment of a protected right must be established. Second, the adverse effects of atmospheric pollution or degradation must attain a certain threshold if they are to fall within the scope of international human rights law. The assessment of such minimum standards is relative and depends on the content of the right to be invoked and all the relevant circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects. Third, and most importantly, it is necessary to establish the causal link between an action or omission of a State, on the one hand, and atmospheric pollution or degradation, on the other hand.

(12) One of the difficulties in the interrelationship between the rules of international law relating to the atmosphere and human rights law is the "disconnect" in their application. While the rules of international law relating to the atmosphere apply not only to the States of victims but also to the States of origin of the harm, the scope of application of human rights treaties is limited to the persons subject to a State's jurisdiction.[740] Thus, where an environmentally harmful activity in one State affects persons in another State, the question of the interpretation of "jurisdiction" in the context of human rights obligations arises. In interpreting and applying the notion, regard may be had to the object and purpose of human rights treaties. In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the International Court of Justice pronounced, when addressing the issue of extraterritorial jurisdiction, "while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions".[741]

(13) One possible consideration is the relevance of the principle of non-discrimination. Some authors maintain that it may be considered unreasonable that international human rights law would have no application to atmospheric pollution or global degradation and that the law can extend protection only to the victims of intra-boundary pollution. They maintain that the non-discrimination principle requires the responsible State to treat transboundary atmospheric pollution or global atmospheric degradation no differently from domestic pollution.[742] Furthermore, if and insofar as the relevant human rights norms are today recognized as either established or emergent rules of customary international law,[743]

---

[736] Art. 17 of the International Covenant on Civil and Political Rights; art. 8 of the European Convention on Human Rights; and art. 11, para. 2, of the American Convention on Human Rights.

[737] Art. 1 of Protocol No. 1 to the European Convention on Human Rights (*ibid.*, vol. 213, No. 2889, p. 221); art. 21 of the American Convention on Human Rights; and art. 14 of the African Charter on Human and Peoples' Rights. See D. Shelton, "Human rights and the environment: substantive rights" in *Research Handbook on International Environmental Law*, M. Fitzmaurice, D.M. Ong and P. Merkouris, eds. (Cheltenham, Edward Elgar, 2010), pp. 267-283, at pp. 267, 269-278.

[738] P.-M. Dupuy and J.E. Viñuales, *International Environmental Law* (Cambridge, United Kingdom, Cambridge University Press, 2015), pp. 320-329.

[739] *Ibid.*, pp. 308-309.

[740] Art. 2 of the International Covenant on Civil and Political Rights; art. 1 of the European Convention on Human Rights; and art. 1 of the American Convention on Human Rights. See A. Boyle, "Human rights and the environment: where next?", *European Journal of International Law*, vol. 23 No. 3 (2012), pp. 613-642, at pp. 633-641.

[741] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 179, para. 109.

[742] Boyle, "Human rights and the environment ..." (see footnote 740 above), pp. 639-640.

[743] B. Simma and P. Alston, "Sources of human rights law: custom, *jus cogens* and general principles", *Australian Year Book of International Law*, vol. 12 (1988), pp. 82-108; V. Dimitrijevic, "Customary law as an instrument for the protection of human rights", Working Paper, No. 7 (Milan, Istituto Per Gli Studi Di Politica Internazionale (ISPI), 2006), pp. 3-30; B. Simma, "Human rights in the International Court of Justice: are we witnessing a sea change?", in *Unity and Diversity of*

they may be considered as overlapping with environmental norms for the protection of the atmosphere, such as due diligence (draft guideline 3), environmental impact assessment (draft guideline 4), sustainable utilization (draft guideline 5), equitable and reasonable utilization (draft guideline 6) and international cooperation (draft guideline 8), among others, which would enable interpretation and application of both norms in a harmonious manner.

(14) In contrast to paragraph 1, which addresses identification, interpretation and application, paragraph 2 deals with the situation in which States wish to develop new rules. It provides that: "States should, to the extent possible, when developing new rules of international law relating to the protection of the atmosphere and other relevant rules of international law, endeavour to do so in a harmonious manner." The paragraph signals a general desire to encourage States, when engaged in negotiations involving the creation of new rules, to take into account the systemic relationships that exist between rules of international law relating to the atmosphere and rules in other legal fields.

(15) Paragraph 3 highlights the plight of those in vulnerable situations because of atmospheric pollution and atmospheric degradation. It has been formulated to make a direct reference to atmospheric pollution and atmospheric degradation. The reference to paragraphs 1 and 2 captures both the aspects of "identification, interpretation and application", on the one hand, and "development", on the other hand. The phrase "special consideration should be given to persons and groups particularly vulnerable to atmospheric pollution and atmospheric degradation" underlines the broad scope of the consideration to be given to the situation of vulnerable groups, covering both aspects of the present topic, namely "atmospheric pollution" and "atmospheric degradation". It was not considered useful to refer in the text to "human rights", or even to "rights" or "legally protected interest".

(16) The second sentence of paragraph 3 gives examples of groups that may be found in vulnerable situations in the context of atmospheric pollution and atmospheric degradation. The World Health Organization has noted that: "All populations will be affected by a changing climate, but the initial health risks vary greatly, depending on where and how people live. People living in small island developing States and other coastal regions, megacities, and mountainous and polar regions are all particularly vulnerable in different ways."[744] In the Sustainable Development Goals adopted by the General Assembly in its 2030 Agenda for Sustainable Development, atmospheric pollution is addressed in Goals 3.9 and 11.6, which call, in particular, for a substantial reduction in the number of deaths and illnesses from air pollution, and for special attention to ambient air quality in cities.[745]

(17) The phrase in the second sentence of paragraph 3 "may include, *inter alia*" denotes that the given examples are not necessarily exhaustive. Indigenous peoples are, as was declared in the Report of the Indigenous Peoples' Global Summit on Climate Change, "the most vulnerable to the impacts of climate change because they live in the areas most affected by climate change and are usually the most socio-economically disadvantaged".[746]

International Law: Essays in Honour of Professor Pierre-Marie Dupuy, D. Alland and others, eds. (Leiden, Martinus Nijhoff, 2014), pp. 711-737; and H. Thirlway, "International law and practice: human rights in customary law: an attempt to define some of the issues", *Leiden Journal of International Law*, vol. 28 (2015), pp. 495-506.

[744] World Health Organization, *Protecting Health from Climate Change: Connecting Science, Policy and People* (Geneva, 2009), p. 2.

[745] General Assembly resolution 70/1 of 25 September 2015 on transforming our world: the 2030 Agenda for Sustainable Development; see B. Lode, P. Schönberger and P. Toussaint, "Clean air for all by 2030? Air quality in the 2030 Agenda and in international law", *Review of European, Comparative and International Environmental Law*, vol. 25, No. 1 (2016), pp. 27-38. See also the indicators for these targets specified in 2016 (3.9.1: mortality rate attributed to household and ambient air pollution; and 11.6.2: annual mean levels of fine particulate matter in cities).

[746] "Report of the Indigenous Peoples' Global Summit on Climate Change, 20-24 April 2009, Anchorage, Alaska", p. 12, available from www.un.org/ga/president/63/letters/globalsummitoncc.pdf#search=%27 (accessed 7 July 2017). See R.L. Barsh, "Indigenous peoples", in *The Oxford Handbook of International Environmental Law*, D. Bodansky and others, eds. (Oxford,

People of the least developed countries are also placed in a particularly vulnerable situation as they often live in extreme poverty, without access to basic infrastructure services and to adequate medical and social protection.[747] People of low-lying areas and small-island developing States affected by sea-level rise are subject to the potential loss of land, leading to displacement and, in some cases, forced migration. Inspired by the preamble of the Paris Agreement, in addition to the groups specifically indicated in paragraph 3 of draft guideline 9, other groups of potentially particularly vulnerable people include local communities, migrants, women, children, persons with disabilities and also the elderly, who are often seriously affected by atmospheric pollution and atmospheric degradation.[748]

Oxford University Press, 2007), pp. 829-852; B. Kingsbury, "Indigenous peoples", in *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), vol. V, pp. 116-133; and H.A. Strydom, "Environment and indigenous peoples", in *The Max Planck Encyclopedia of Public International Law*, R. Wolfrum, ed. (Oxford, Oxford University Press, 2012), vol. III, pp. 455-461.

[747] World Bank Group Climate Change Action Plan, 7 April 2016, para. 104, available from http://pubdocs.worldbank.org/en/677331460056382875/WBG-Climate-Change-Action-Plan-public-version.pdf (accessed 7 July 2017).

[748] The Committee on the Elimination of Discrimination against Women has an agenda on "gender-related dimensions of disaster risk reduction and climate change"; see http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/ClimateChange.aspx (accessed 7 July 2017). Along with women and children, the elderly and persons with disabilities are usually mentioned as vulnerable people. See World Health Organization, *Protecting Health from Climate Change* ... (footnote 744 above) and the World Bank Group Climate Change Action Plan (footnote above). The Inter-American Convention on Protecting the Human Rights of Older Persons of 2015 (*General Assembly of the Organization of American States, Forty-fifth Regular Session, Proceedings*, vol. I (OEA/Ser.P/XLV-O.2), pp. 11-38) provides, in article 25 (right to a healthy environment), that: "Older persons have the right to live in a healthy environment with access to basic public services. To that end, States Parties shall adopt appropriate measures to safeguard and promote the exercise of this right, inter alia: a. To foster the development of older persons to their full potential in harmony with nature; b. To ensure access for older persons, on an equal with others, to basic public drinking water and sanitation services, among others."

Chapter VII
Immunity of State officials from foreign criminal jurisdiction

A. Introduction

68. The Commission, at its fifty-ninth session (2007), decided to include the topic "Immunity of State officials from foreign criminal jurisdiction" in its programme of work and appointed Mr. Roman A. Kolodkin as Special Rapporteur.[749] At the same session, the Commission requested the Secretariat to prepare a background study on the topic, which was made available to the Commission at its sixtieth session (2008).[750]

69. The Special Rapporteur submitted three reports. The Commission received and considered the preliminary report at its sixtieth session (2008) and the second and third reports at its sixty-third session (2011).[751] The Commission was unable to consider the topic at its sixty-first (2009) and sixty-second (2010) sessions.[752]

70. The Commission, at its sixty-fourth session (2012), appointed Ms. Concepción Escobar Hernández as Special Rapporteur to replace Mr. Kolodkin, who was no longer a member of the Commission.[753] The Commission received and considered the preliminary report of the Special Rapporteur at the same session (2012), her second report during the sixty-fifth session (2013), her third report during the sixty-sixth session (2014), her fourth report during the sixty-seventh session (2015) and her fifth report, in a partial debate, during the sixty-eighth session (2016).[754] On the basis of the draft articles proposed by the Special Rapporteur in the second, third and fourth reports, the Commission has thus far provisionally adopted six draft articles and commentaries thereto. Draft article 2 on the use of terms is still being developed.[755]

B. Consideration of the topic at the present session

71. The Commission had before it the fifth report of the Special Rapporteur analysing the question of limitations and exceptions to the immunity of State officials from foreign

---

[749] At its 2940th meeting, on 20 July 2007 (*Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 376). The General Assembly, in paragraph 7 of its resolution 62/66 of 6 December 2007, took note of the decision of the Commission to include the topic in its programme of work. The topic had been included in the long-term programme of work of the Commission during its fifty-eighth session (2006), on the basis of the proposal contained in annex A of the report of the Commission (*Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 257).

[750] *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), para. 386. For the memorandum prepared by the Secretariat, see A/CN.4/596 and Corr.1.

[751] A/CN.4/601, A/CN.4/631 and A/CN.4/646, respectively.

[752] See *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 207; and *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 343.

[753] *Ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 266.

[754] A/CN.4/654, A/CN.4/661, A/CN.4/673 and Corr.1, A/CN.4/687 and A/CN.4/701, respectively.

[755] See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 48-49. At its 3174th meeting, on 7 June 2013, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 1, 3 and 4 and, at its 3193rd to 3196th meetings, on 6 and 7 August 2013, it adopted the commentaries thereto (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 48-49). At its 3231st meeting, on 25 July 2014, the Commission received the report of the Drafting Committee and provisionally adopted draft articles 2 (e) and 5 and, at its 3240th to 3242nd meetings, on 6 and 7 August 2014, it adopted the commentaries thereto. At its 3329th meeting, on 27 July 2016, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, and at its 3345th and 3346th meetings, on 11 August 2016, the Commission adopted the commentaries thereto (*ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 194-195 and 250 and, *ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 176).

criminal jurisdiction (A/CN.4/701), which it had begun to debate at its sixty-eighth session. The report addressed, in particular, the prior consideration by the Commission of the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction, offered an analysis of relevant practice, addressed some methodological and conceptual questions related to limitations and exceptions, and considered instances in which the immunity of State officials from foreign criminal jurisdiction would not apply. The Special Rapporteur drew the conclusion that it had not been possible to determine, on the basis of practice, the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, she came to the conclusion that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction did apply to State officials in the context of immunity *ratione materiae*. As a consequence of the analysis, the report contained a proposal for draft article 7 on crimes in respect of which immunity did not apply.[756]

72. At its sixty-eighth session, given that the report had not been available in all languages, the Commission underlined that the debate on the report would continue in order to be finalized at the present session. Accordingly, the Commission continued its debate on the fifth report at its 3360th to 3365th meetings, on 18, 19, 23, 24, 26 and 30 May 2017, respectively.

73. Following its debate on the report, the Commission, at its 3365th meeting, on 30 May 2017, decided to refer draft article 7, as contained in the Special Rapporteur's fifth report, to the Drafting Committee, taking into account the debate in the Commission.

74. At its 3378th meeting, on 20 July 2017, the Commission considered the report of the Drafting Committee and provisionally adopted draft article 7 (see section C.1 below). Provisional adoption was by recorded vote, with 21 votes in favour, 8 votes against and 1 abstention. The members present voted as follows:

Mr. Carlos J. Argüello Gomez	Yes
Mr. Yacouba Cissé	Yes
Ms. Concepción Escobar Hernández	Yes
Ms. Patrícia Galvão Teles	Yes
Mr. Juan Manuel Gómez-Robledo	Yes
Mr. Hussein A. Hassouna	Yes
Mr. Mahmoud D. Hmoud	Yes
Mr. Huikang Huang	No

---

[756] The text of draft article 7, as proposed by the Special Rapporteur in her fifth report, reads as follows:

Draft article 7

Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes:

(a) Genocide, crimes against humanity, war crimes, torture and enforced disappearances;

(b) Crimes of corruption;

(c) Crimes that cause harm to persons, including death and serious injury, or to property, when such crimes are committed in the territory of the forum State and the State official is present in said territory at the time that such crimes are committed.

2. Paragraph 1 shall not apply to persons who enjoy immunity *ratione personae* during their term of office.

3. Paragraphs 1 and 2 are without prejudice to:

(a) Any provision of a treaty that is binding on the forum State and the State of the official, under which immunity would not be applicable;

(b) The obligation to cooperate with an international tribunal which, in each case, requires compliance by the forum State.

Mr. Charles Chernor Jalloh	Yes
Mr. Roman A. Kolodkin	No
Mr. Ahmed Laraba	No
Ms. Marja Lehto	Yes
Mr. Shinya Murase	Yes
Mr. Sean D. Murphy	No
Mr. Hong Thao Nguyen	Yes
Mr. Georg Nolte	No
Ms. Nilüfer Oral	Yes
Mr. Hassan Ouazzani Chahdi	Yes
Mr. Ki Gab Park	Yes
Mr Chris Maina Peter	Yes
Mr. Ernest Petrič	No
Mr. Aniruddha Rajput	No
Mr. August Reinisch	Yes
Mr. Juan José Ruda Santolaria	Yes
Mr. Gilberto Vergne Saboia	Yes
Mr. Pavel Šturma	Abstain
Mr. Dire D. Tladi	Yes
Mr. Eduardo Valencia-Ospina	Yes
Mr. Marcelo Vázquez-Bermúdez	Yes
Sir Michael Wood	No

75. Explanations of vote before the vote were made by Mr. Roman A. Kolodkin, Mr. Sean D. Murphy, Sir Michael Wood, Mr. Huikang Huang, Mr. Aniruddha Rajput, Mr. Ernest Petrič, Mr. Juan Manuel Gómez-Robledo, Mr. Juan José Ruda Santolaria and Mr. Georg Nolte. Explanations of vote after the vote were made by Mr. Dire D. Tladi, Mr. Pavel Šturma, Mr. Mahmoud D. Hmoud, Mr. Charles Chernor Jalloh, Mr. Shinya Murase, Mr. Yacouba Cissé, Mr. Hussein A. Hassouna, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Ms. Concepción Escobar Hernández and Mr. Hong Thao Nguyen. Those explanations of vote were recorded in the summary record of the 3378th meeting (A/CN.4/SR.3378).

76. At its 3387th to 3389th meetings, on 3 and 4 August 2017, the Commission adopted the commentaries to the draft article provisionally adopted at the present session (see section C.2 below).

77. Informal consultations on immunity of State officials from foreign criminal jurisdiction, conducted by the Special Rapporteur, were held on 18 July 2017. The informal consultations were open-ended and their aim was to exchange views and share ideas on the procedural aspects of immunity of State officials from foreign criminal jurisdiction, which will be the subject under consideration in the sixth report of the Special Rapporteur, to be submitted in 2018. The consultations were based on an informal concept paper on procedural provisions and safeguards prepared by the Special Rapporteur. At the 3378th meeting, on 20 July 2017, the Special Rapporteur informed the Commission on the development of the informal consultations.

1. Introduction by the Special Rapporteur of the fifth report

78. The Special Rapporteur recalled that the fifth report, on limitations and exceptions to immunities of State officials from foreign criminal jurisdiction, dealt with a subject that had been the subject of recurrent debate over the years in the Commission and in the Sixth

Committee, eliciting diverse, and often opposing, views. There was a general desire to proceed cautiously and prudently given the sensitivity of the subject and its importance for States. The report itself had been introduced at the sixty-eighth session of the Commission[757] and had been the subject of a partial debate.[758] The Special Rapporteur noted that, due to the change in composition of the Commission, and in the light of the comments and observations on the report at the sixty-eighth session of the Commission and in the Sixth Committee at the seventy-first session of the General Assembly, she considered it appropriate at the current session to make additional introductory remarks on the report. Accordingly, the Special Rapporteur gave a brief overview of the previous debates on the fifth report in the Commission and the Sixth Committee.

79. Commenting on the fifth report itself, she noted that it followed a similar methodology to previous reports, examining State practice, international jurisprudence, the prior work of the Commission and an analysis of domestic legislation for the present report. The report had also taken into account the information received from Governments in response to questions posed by the Commission and oral statements by States in the Sixth Committee. The Special Rapporteur underlined that the fifth report, like the previous reports, had to be read and understood together with the prior reports on the topic.

80. Building on her presentation at the previous session, which she considered to be an integral part of the prior reports considered by the Commission, the Special Rapporteur highlighted a number of ideas central to the report. First, she noted that the phrase "limitations and exceptions" echoed the different arguments put forward in practice for the non-application of immunity. The Special Rapporteur stressed that the distinction between limitations and exceptions, despite its theoretical and normative value for the systemic interpretation of the immunity regime, had no practical significance, as "limitations" or "exceptions" led to the same consequence, namely the non-application of the legal regime of the immunity of State officials from foreign criminal jurisdiction in a particular case.

81. Second, the report addressed limitations and exceptions within the specific framework of immunity and within the context of the international legal system as a whole. In that regard, the Special Rapporteur underscored: (a) the interrelationship between immunity and jurisdiction, even though the two were different concepts; (b) the procedural nature of immunity; (c) the distinction between immunity of State officials and State immunity; and (d) the distinction between immunity from foreign criminal jurisdiction and immunity before international criminal courts and tribunals. The report further examined immunity from the point of view of international law as a normative system, in which immunity sought to guarantee respect for sovereign equality of States but had to be balanced against other important values of the international legal system.

82. Third, the report focused on the practice of States, which constituted the cornerstone of the Commission's work. The report examined to what extent practice revealed the existence of customary norms that could be codified, following the basic methodology in the Commission's work on the identification of customary international law. It also analysed whether there existed a trend towards progressive development of norms relating to immunity. Going beyond international jurisprudence and treaties, the report studied domestic legislation and decisions of domestic courts. The report also analysed the issues from a systemic perspective, thereby considering the regime of immunity in relation to other aspects of the contemporary international legal system, understood as a whole.

83. On those bases, the report concluded that it had not been possible to determine the existence of a customary rule that allowed for the application of limitations or exceptions in respect of immunity *ratione personae*, or to identify a trend in favour of such a rule. On the other hand, the report concluded that limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction were extant in the context of immunity *ratione materiae*. Although varied, the practice showed a clear trend towards considering the commission of international crimes as a bar to the application of immunity *ratione materiae*

---

[757] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), paras. 196-208.

[758] *Ibid.*, paras. 209-246.

of State officials from foreign criminal jurisdiction, for the reason that such crimes did not constitute official acts, that the crimes concerned were grave or that they undermined the values and principles recognized by the international community as a whole.

84. Finally, the Special Rapporteur noted that the Commission should approach the topic of immunity from foreign criminal jurisdiction, and in particular the question of limitations and exceptions, from the perspectives of both codification and the progressive development of international law. The challenge for the Commission was to decide whether to support a developing trend in the field of immunity, or whether to halt such development.

85. The Special Rapporteur also made specific comments on the proposed draft article 7. The three paragraphs of the draft article sought to address, in an integral fashion, all the elements that defined the regime of limitations and exceptions to immunity.

86. Paragraph 1 identified crimes to which immunity would not apply. Following the model of the United Nations Convention on Jurisdictional Immunities of States and Their Property, the expression "does not apply" was used to capture both limitations and exceptions. The paragraph identified situations in which immunity did not apply by reference to the crimes over which jurisdiction was sought, namely in case of (a) international crimes; (b) crimes of corruption; and (c) the so-called "territorial tort" exception.

87. Paragraph 2 defined the scope of limitations and exceptions. It specified that the limitations and exceptions in paragraph 1 did not apply to the persons who enjoyed immunity *ratione personae*, namely Heads of State, Heads of Government and Ministers for Foreign Affairs. It emphasized, however, that the enjoyment of immunity *ratione personae* was time-bound, which meant that the limitations and exceptions to immunity would apply to the troika once they had left office.

88. Paragraph 3 contained a without-prejudice provision in respect of situations covered by special regimes. The first subparagraph related to instances in which immunity of officials was not applicable due to the existence of treaty relations between the States concerned. The second subparagraph covered cases in which immunity might be affected by a general obligation to cooperate with an international criminal court. Both of those situations stemmed from examples in practice.

89. With regard to the future work of the Commission on the topic, the Special Rapporteur indicated her intention to conduct informal consultations on various procedural matters relating to the topic, during the present session of the Commission. It was hoped that such consultations would further inform the content of her sixth report, to be submitted during the seventieth session of the Commission.

2. Summary of the debate

90. The debate at the present session was a continuation of the discussion on the fifth report, which had commenced at the sixty-eighth session of the Commission. The summary below should be read in combination with the summary of the topic in the report of the Commission on the work of its sixty-eighth session.

(a) General comments

91. Members commended the Special Rapporteur for her rich and well-documented fifth report, which offered a thoughtful analysis of State practice as reflected in treaties and domestic legislation, as well as in international and domestic case law. Members also recalled, with appreciation, the work by the former Special Rapporteur, as well as the study by the Secretariat. Members acknowledged the complex and contentious nature of the topic, in particular the question of limitations and exceptions. The comments made focused generally on methodological and conceptual issues raised in the fifth report, including on the methodology and treatment of State practice, the mandate of the Commission in the progressive development of international law and its codification, the regime of immunity in the international legal system as a whole, as well as the interrelationship between the question of limitations and exceptions and procedural aspects.

Methodology and treatment of State practice

92. Several members expressed their appreciation for the detailed and comprehensive analysis of State practice contained in the fifth report. Some members noted their support for the methodology of the Special Rapporteur and maintained that the report provided a firm foundation for the proposed draft article.

93. Other members stated that, while the discussion of practice was extensive, it remained unclear how it related to the specific limitations and exceptions contained in draft article 7. Some members also questioned whether the report, while not finding coherent practice against the non-applicability of immunity, contained sufficient evidence to support the limitations and exceptions to immunity that it proposed. It was noted that many of the examples cited in the report related to State immunity or immunity in civil proceedings, rather than criminal prosecutions. In the view of some members, the report selectively discussed cases that supported the establishment of limitations and exceptions to immunities, while ignoring evidence indicating the opposite. It was noted that the examples in the report were taken from different contexts and time periods and did not demonstrate a linear development towards restrictions on immunity.

94. Members disagreed on the extent and the relevance of treaty practice with regard to limitations and exceptions to immunity. Some members asserted that treaty practice did not establish a trend towards restricting the immunity of foreign State officials. In their view, few treaties provided for limitations and exceptions, and any practice in regard to those treaties could not be counted towards the existence of a customary rule. It was pointed out that many treaties, including treaties relating to diplomatic and consular relations, as well as those relating to international crimes, did not provide for limitations or exceptions. Moreover, a number of members noted that treaties providing for individual responsibility in the case of international crimes, even where they denied immunity before international courts, did not affect the immunity of foreign officials before domestic courts.

95. Other members asserted that treaty practice had marked a deliberate move towards limitations and exceptions of immunity of State officials. Some members placed that development within the context of the work of the Commission on individual criminal responsibility, noting that relevant instruments, such as the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, as well as the work on the draft Code of Crimes against the Peace and Security of Mankind and international criminal jurisdiction rejected immunity for international crimes. Such members maintained that the present draft article should follow the example of the Rome Statute of the International Criminal Court, which in article 27 declares the irrelevance of official capacity. Reference was also made to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), as adopted by the African Union. Furthermore, some members noted that the proliferation of treaties containing a "prosecute or extradite" provision had a bearing on the scope of immunity of State officials. They suggested that the obligation to prosecute international crimes implied a limitation on the scope of immunity of State officials.

96. With regard to domestic legislation, some members noted that there were few examples of domestic laws recognizing limitations and exceptions to immunity of foreign officials, even in cases of international crimes. A few members noted that domestic legislation implementing the Rome Statute typically only dealt with institutional issues or with questions of extradition, rather than immunity. It was highlighted that the few countries whose legislation had contained broader exception clauses had recently revised their laws on immunity of State officials to restrict the scope of the limitations and exceptions.

97. Other members maintained that domestic laws reflected the trend indicated by the Special Rapporteur. The view was expressed that even if domestic legislation often focused on State immunity, at least it demonstrated a trend towards the restriction of immunity. Some members noted that the domestic implementation of the Rome Statute had a direct effect on the regime of immunity in domestic courts.

98. Several members criticized the small number of domestic cases examined in the fifth report. It was noted that many of the cases had been overturned or did not relate to

immunity of State officials from foreign criminal jurisdiction, but to State immunity or immunity in civil proceedings. Some members asserted that the report should have examined the reasons why immunity had been declined or upheld in particular cases; should have analysed cases in which prosecutors had decided not to prosecute due to the immunity of the official involved; and should have considered cases in which States had unsuccessfully invoked immunity.

99. A number of members maintained that the small sample of domestic cases analysed in the report did not affect its substantive analysis. The Special Rapporteur was encouraged to further consider regional practice, including, for example, case law from Asia and the jurisprudence of the Inter-American Court of Human Rights.

100. Several members stressed that the trend in international jurisprudence ran counter to the conclusions drawn in the fifth report. It was emphasized that international and regional courts had repeatedly upheld immunity, even in cases involving international crimes or violations of peremptory norms of international law (*jus cogens*). International jurisprudence had underlined that immunity, which was procedural in nature, was not affected by the gravity of an act. A number of members also emphasized the difference between international and domestic courts. They maintained that the lack of immunity before international criminal tribunals did not entail the non-application of immunity in domestic courts. It was pointed out that international tribunals had only recognized the denial of immunity by domestic courts in cases that related to cooperation with such tribunals.

101. Other members asserted that the analysis of international jurisprudence by the Special Rapporteur supported her approach to limitations and exceptions of immunity. Several members noted that many of the international decisions upholding immunity did not relate to individual criminal responsibility, but dealt with immunity in civil proceedings, State immunity, officials enjoying immunity *ratione personae*, or questions of State responsibility. Some members also pointed out that international courts and tribunals had made the application of immunity conditional on the availability of alternative redress; if no such redress was available, immunity could not be upheld. Reference was made to individual and dissenting opinions that emphasized that the requirements of sovereignty should not override the need for accountability, but that a balance should be struck.

Progressive development of international law and its codification

102. In the view of some members, the report could have indicated more clearly whether it sought to determine the scope of existing international law (*lex lata*), whether it followed an emerging trend towards desirable norms (*lex ferenda*) or whether it aimed to set out "new law". It was noted that the Commission's dual mandate of codification and progressive development required it to closely follow established practice or to openly assert the progressive nature of its work, respectively. Several members urged the Commission to focus on existing law, rather than to engage in progressive development. It was noted that the Commission was not drafting a new treaty, the rules of which would ultimately be subject to the approval of States, but that it aimed to produce a set of guidelines on current practice, for use by non-specialists involved in domestic prosecutions.

103. In that regard, a number of members criticized the fifth report for the nature in which it asserted the existence of customary international law with regard to limitations and exception, without establishing a solid foundation for that in practice. In the view of several members, the report did not sufficiently highlight the serious disagreements within the Commission and within the Sixth Committee over the substantive and procedural aspects of that issue. It was suggested that, due to such differences, the Commission ought to proceed cautiously.

104. Other members stated that the Commission's work on the question of limitations and exceptions should reflect both codification and progressive development. It was asserted that the fifth report accurately captured the current state of international law on immunity of foreign officials. Such members noted that the lingering uncertainty over the scope of immunity ought to encourage the Commission to provide guidelines on the issue, irrespective of the views of States. The Commission was urged not to forget its

commitment to the progressive development of international law, as it had displayed in various earlier instruments. For some of those members, the possibility of developing draft articles to form the basis of a treaty on the subject could not be discounted at this stage.

105. Some members questioned whether State practice supported an alleged trend towards limitations and exceptions to immunity of State officials as proposed. Those members maintained that no such trend existed or, if a trend could be discerned, that it pointed in the opposite direction. It was recalled that several States had recently restricted the scope of limitations and exceptions to immunity in their domestic legislation, and international and regional courts had typically upheld the immunity of State officials from foreign criminal jurisdiction in recent cases.

106. Other members asserted that, even if not all aspects of the report found a firm basis in customary international law, a trend towards limitations and exceptions of immunity *ratione materiae* did exist. A number of members claimed that developments in the field of State immunity, international criminal law and international human rights law supported such a trend. Moreover, it was asserted that courts and tribunals increasingly refused to apply immunity, either because the alleged acts violated peremptory norms of international law (*jus cogens*) or because they considered that such acts could not be performed in an official capacity. Further, certain States had expressed their support for restricting the scope of immunity of foreign officials. Some members maintained that the Commission ought to bolster such a trend, in order to fight impunity and lift impediments to the prosecution of international crimes.

International law as a system

107. It was emphasized by some members that the draft articles ought to strike a balance between, on the one hand, the sovereign equality of States and the need for stability in international relations and, on the other hand, the interest of the international community as a whole in preventing and punishing the most serious crimes under international law.

108. Other members expressed concern that the limitations and exceptions to immunity proposed by the Special Rapporteur could foster abuse, for example by enabling politically motivated trials of State officials in foreign jurisdictions. This could weaken stability in international relations and run counter to the cause of fighting impunity and promoting human rights. It was emphasized that, as a fundamental principle of international law, the courts of one State should not sit in judgment over the acts of another State.

109. Several members noted that the system of immunity could and should not stand in the way of the protection of the fundamental interests of the international community. It was emphasized that the protection of human rights and the fight against impunity were not peripheral to the sovereignty of States, but had to be reconciled with it. In the view of such members, perpetrators of international crimes ought not to be allowed to hide behind the cloak of sovereignty to shield themselves from prosecution, as their acts caused severe instability in the countries and regions in which they were perpetrated, eventually affecting the international community as a whole. The point was made that the rules on immunity should not be considered in isolation, but in the light of other norms of the international legal system.

Procedural aspects of immunity

110. Some members noted that the question of limitations and exceptions was closely related to that of procedural aspects of immunity, including procedural safeguards and guarantees. Several members expressed regret that the Special Rapporteur had not submitted a sixth report on that issue at the present session. A number of members suggested that the Commission ought to postpone its work on limitations and exceptions until after the Special Rapporteur had expounded her views on procedural aspects in her sixth report, so that the two issues could be considered in conjunction.

111. It was noted that procedural safeguards could help to strike the necessary balance between the respect for the sovereign equality of States and the need to fight impunity. Several members referred to the work of the previous Special Rapporteur on the topic, who had dealt with various procedural issues relating to timing, invocation, burden of proof and

the waiver of immunity. With regard to waiver, some members proposed the establishment of a procedure whereby immunity had to be explicitly invoked by the State of the official; or the establishment of a treaty-based duty to "waive or prosecute", according to which States would have to choose whether to waive immunity in a foreign court or to prosecute the case themselves.

112. Emphasizing the procedural nature of immunity, a number of members noted that, when successfully invoked through diplomatic channels or in courts, immunity suspended the jurisdiction of foreign courts, but did not affect the criminal responsibility of the alleged offenders. Given its preliminary nature, courts had to consider the question of immunity before proceeding to the merits. It was stated that, for this reason, the gravity of an alleged act could have no bearing on the application of immunity, or on its sovereign or official nature. Such members maintained that this did not leave an accountability gap, since, for example, a State, by invoking the immunity of its official and recognizing its acts as its own, would trigger its own responsibility and could be sued itself at the national or international level.

113. Other members maintained that, while a discussion of procedural aspects was very important for the topic as a whole, the Commission first had to identify the substantive features of limitations and exceptions to immunity. It was pointed out that procedural aspects were relevant to the draft articles as a whole and could only be considered after all substantive elements had been discussed. Several members wished not to pre-empt the Commission's debate on the topic of the sixth report and urged the Commission not to delay its consideration of the limitations and exceptions to immunity.

114. A number of members asserted that there was a strong link between immunity and impunity for international crimes. It was pointed out that, if no alternative forum or jurisdiction for prosecution of international crimes was available, the procedural barrier of immunity in domestic courts would entail substantive effects. Some members emphasized that substantive justice should not be the victim of procedural justice, particularly in the case of violations of peremptory norms of international law (*jus cogens*). Such members cautioned that an exclusively procedural approach to immunity would have a negative impact on the development of individual responsibility in international law.

115. It was noted that the International Criminal Court, the most obvious forum for the prosecution of State officials, did not have the capacity or the resources to prosecute all alleged perpetrators of international crimes. As the Court operated on the basis of complementarity, those members maintained that domestic courts should remain the principal forums for combating impunity. It was also noted that the responsibility of a State for an act did not negate the individual responsibility of an official and should not stand in the way of individual prosecutions.

(b) Specific comments on draft article 7

116. Some members questioned why the proposed title of draft article 7 referred to situations "in respect of which immunity does not apply", when the report discussed "limitations and exceptions" to immunity. It was suggested that the uncertainty over the meaning and scope of the phrase "limitations and exceptions" demonstrated that draft article 7 did not reflect settled international law.

117. A number of members considered that the distinction between limitations and exceptions was useful and should be maintained. It helped to distinguish situations in which immunity was not at issue, because the relevant conduct could not be considered as an official act or as performed in official capacity, from cases in which immunity was excluded on the basis of exceptional circumstances.

118. Other members supported the wording proposed by the Special Rapporteur. It was pointed out that the work on the topic so far had proceeded on the assumption that immunity applied and that draft article 7 should thus deal with its "non-application". Some members noted that a distinction might provide theoretical clarity, but that it had no basis in the practice of States.

119. Some members reiterated their general reservations regarding draft article 7, as proposed. It was suggested that one way forward would be to reformulate the draft article on the basis of an obligation to waive or prosecute core international crimes, which would entail a duty of a State either to waive the immunity of its officials before the courts of a foreign State, or to undertake to fulfil its obligation to prosecute its own officials.

120. A number of members questioned whether the list of crimes included in paragraph 1 was exhaustive or merely illustrative. A suggestion was made to include a general reference to the most serious crimes under international law, rather than including a list of crimes. Some members noted that the paragraph should leave open the possibility of the emergence of new crimes to which immunity would not apply. Other members questioned the basis in customary international law for the crimes listed by the Special Rapporteur, as well as the grounds for including some crimes and not others conceivably within the same genre. It was also suggested that the draft article, or the commentaries thereto, should provide appropriate definitions of the crimes listed.

121. With regard to subparagraph (a), several members expressed their support for the inclusion of the core crimes of genocide, crimes against humanity and war crimes. Some members noted that torture and enforced disappearance, both listed by the Special Rapporteur, fell within the scope of crimes against humanity. Suggestions were made to add the crimes of slavery, apartheid, terrorism and crimes against global cultural heritage.

122. Members further debated whether the crime of aggression should be included in the draft article. Those arguing in favour of inclusion pointed to the prominence of the crime of aggression under the Nürnberg Principles and its pending activation in the Rome Statute. It was also noted that the implementing legislation of some States provided for domestic prosecution of the crime. Other members agreed with the Special Rapporteur that the crime of aggression should be excluded, for the reasons outlined in the fifth report. It was maintained that prosecution of State officials for the crime of aggression by other States would affect the sovereign equality of States, an issue that would not arise in the case of prosecution before an international court.

123. Commenting on subparagraph (b), a number of members questioned whether State practice supported the inclusion of corruption as a limitation or exception to immunity. It was also noted that the text proposed by the Special Rapporteur left the definition and scope of corruption rather vague. Some members maintained that corruption could not be performed in an official capacity, as it was always done with an eye to private gain. In that regard, it was noted that immunity for corruption had already been excluded on the basis of draft article 6. It was suggested that the subparagraph could be removed and that a reference to corruption could be included in the commentaries.

124. Other members supported the inclusion of the crime of corruption in the text of the draft article, noting that the international community had to cooperate to prevent and punish the crime. It was pointed out that domestic courts had often rejected claims for immunity in corruption cases, that many States legislated to prevent and punish corruption, and that corruption had been the subject of various international and regional conventions.

125. Some members emphasized that corruption seriously affected the functioning of public institutions and the rule of law and could significantly impact the socioeconomic situation of domestic populations. It was suggested that the draft article should focus on "grand" or large-scale corruption. A suggestion was made that the subparagraph could indicate what should happen to the proceeds of the crime of corruption when officials were prosecuted in foreign jurisdictions. It was pointed out that that was a matter of the political will of the States involved, but that ordinarily the funds would have to be returned to the country from which they had been taken.

126. Some members noted that the territorial tort exception, on which subparagraph (c) was modelled, was well established in civil proceedings but not in the criminal sphere. It was pointed out that the authorities cited by the Special Rapporteur mostly referred to civil cases and that the report insufficiently examined its applicability in criminal law. Several members mentioned that the concept remained controversial in international law and that the report left a number of issues open, for example its application to military activities and other public acts. In that regard, it was suggested that the subparagraph be formulated more

narrowly. Several members referred to the definition proposed by the previous Special Rapporteur on the topic. It was also suggested that the scope of the subparagraph be restricted to specific acts contrary to State sovereignty, such as espionage, political assassination and sabotage.

127. Members generally agreed with the substance of paragraph 2, noting that it reflected existing practice. Members recommended that the commentaries should specify that only the troika of Heads of State, Heads of Government and Ministers for Foreign Affairs could enjoy immunity *ratione personae*. It was emphasized that, in line with international jurisprudence, immunity *ratione personae* was without prejudice to the criminal responsibility of those enjoying it. A suggestion was made to indicate that immunity *ratione personae* did not apply before international courts.

128. Some members suggested that paragraph 2 was superfluous and could be deleted. They proposed to specify in paragraph 1 that the limitations and exceptions listed in the draft article only applied to immunity *ratione materiae*. Other members preferred to retain the paragraph to highlight the difference between immunity *ratione personae* and immunity *ratione materiae*. A suggestion was made to align the temporal scope of the application of immunity *ratione personae* and immunity *ratione materiae* with draft articles 4 and 6. Moreover, the view was expressed that immunity *ratione personae* should be restricted, as it could lead to impunity in cases of lifetime rulers.

129. Several members accepted the inclusion of the without-prejudice clause in paragraph 3. It was noted that, contrary to subparagraph (a), the clause should also apply to treaties under which immunity was applicable. With regard to subparagraph (b), some members considered the reference to an "international tribunal" too vague and suggested that the draft article specify whether that referred to international criminal courts and tribunals, or to any international tribunal. The view was expressed that the paragraph remained prejudicial and should be deleted, as it could potentially affect matters subject to ongoing judicial proceedings.

(c) Future work

130. Many members expressed their anticipation of the sixth report, which would deal with procedural aspects of immunity. It was suggested that the Special Rapporteur should discuss the relationship between immunity and statutes of limitation for crimes to which no limitations or exceptions applied. Some members noted that the Commission should revisit some of the texts provisionally adopted, for example the definition of "immunity from jurisdiction", in order to determine whether it included questions of inviolability.

3. Concluding remarks of the Special Rapporteur

131. In her summary of the debate, the Special Rapporteur expressed her satisfaction with the wide-ranging and interesting discussion that the fifth report had evoked. Responding to some of the criticism on the structure and content of the report, the Special Rapporteur emphasized that all sections of the report were equally relevant to its conclusions. She also noted that it was the substance of the arguments advanced that mattered, not whether she had followed the approach of the previous Special Rapporteur.

132. With regard to the analysis of practice in the fifth report, the Special Rapporteur recalled the various views expressed. She emphasized that the jurisprudence of international courts did not unequivocally exclude the application of limitations and exceptions to immunity *ratione materiae*, as those decisions primarily dealt with State immunity or immunity *ratione personae*. She also stressed the importance of national jurisprudence, which, although it might have been limited and not sufficiently homogeneous, was at the heart of the project. She thanked members for suggesting the addition of international, regional and domestic case law.

133. The Special Rapporteur stated the report's analysis of domestic legislation helped differentiate immunity of State officials from State immunity; highlighted the relative nature of State immunity; and illustrated the use of the "territorial tort exception". She also noted that domestic legislation implementing the Rome Statute could shine a light on the question of immunity of State officials, particularly when it went beyond the requirements

of the Rome Statute. The Special Rapporteur noted that other forms of State practice, such as decisions by prosecutors or diplomatic demarches, were typically not available in the public domain and could thus not be considered as relevant practice.

134. The Special Rapporteur acknowledged the disagreement between members over a possible customary rule or emerging trend towards limitations and exceptions to immunity of State officials. She maintained that the Commission ought to focus on identifying the relevant rules *lex lata* and *lex ferenda* relating to immunity. She did not support the view that the Commission was engaged in crafting "new law" on the issue, as suggested by some members. In that regard, the Special Rapporteur noted that the draft articles, similar to other projects of the Commission, contained elements of both codification and progressive development and that they should be assessed in that light.

135. The Special Rapporteur reiterated her position that the distinction between limitations and exceptions, as set out in the report, helped to illuminate the concept of immunity of State officials and its role within the international legal system. In her view, that approach was not incompatible with the pragmatic formulation of draft article 7, which focused on the situation in which immunity "does not apply"; rather, that formulation avoided a number of controversies relating to the distinction between limitations and exceptions and found its basis in practice.

136. The Special Rapporteur agreed with members that a discussion of the procedural aspects of immunity was of vital importance to the project. She noted, however, that procedural issues went beyond questions of limitations and exceptions, affected the draft articles as a whole and should be dealt with after the Commission had considered the issue of limitations and exceptions to immunity. She pointed out that the previous Special Rapporteur had taken a similar approach and reiterated her offer to hold informal consultations on that matter, in preparation of submission of the sixth report.

137. Turning to specific comments on the draft article proposed in the fifth report, the Special Rapporteur noted that many members were in favour of retaining paragraph 1, although various suggestions for revision of its content had been made. With regard to subparagraph (a), the Special Rapporteur expressed her readiness to include the crime of apartheid, but continued to have reservations regarding the inclusion of other transnational crimes, as the latter were treaty based and did not derive from custom. Moreover, the Special Rapporteur maintained her hesitancy regarding the inclusion of the crime of aggression, as it risked increased politicization of the entire project. For a similar reason, she preferred to maintain a list of specific crimes, rather than including an open, general reference to international crimes. Definitions of the specific crimes could be provided in the commentaries, possibly by reference to existing treaties.

138. The Special Rapporteur noted that the inclusion of corruption in subparagraph (b) remained controversial. She acknowledged that the provision should principally apply to matters of "grand corruption", a term that was to be further specified in the commentaries. She emphasized that, since corruption was always committed for private gain, it could not be considered as an act performed in an official capacity, to which immunity *ratione materiae* would apply. With regard to the "territorial tort exception", as contained in subparagraph (c), the Special Rapporteur maintained that its application was not restricted to the sphere of civil jurisdiction. In its current form, it aimed at addressing major offences, such as sabotage and espionage.

139. The Special Rapporteur also noted the general agreement on paragraph 2, which highlighted that limitations and exceptions did not apply in case of immunity *ratione personae*, a well-established position in practice and doctrine. In her view, the explicit reference to immunity *ratione personae* provided a balance between the principle of sovereign equality and the need to fight impunity, which might be undone were the paragraph deleted. She also expressed her preference for retaining the non-prejudice clauses in paragraph 3, which would facilitate the resolution of any normative conflict between the draft articles and existing international instruments, in particular those relating to international criminal courts and tribunals.

C. Text of the draft articles on immunity of State officials from foreign criminal jurisdiction provisionally adopted so far by the Commission

1. Text of the draft articles

140. The text of the draft articles provisionally adopted so far by the Commission is reproduced below.

Immunity of State officials from foreign criminal jurisdiction

Part One
Introduction

Article 1
Scope of the present draft articles

1. The present draft articles apply to the immunity of State officials from the criminal jurisdiction of another State.

2. The present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State.

Article 2
Definitions

For the purposes of the present draft articles:

...

(e) "State official" means any individual who represents the State or who exercises State functions;

(f) an "act performed in an official capacity" means any act performed by a State official in the exercise of State authority;

Part Two
Immunity *ratione personae**

Article 3
Persons enjoying immunity *ratione personae*

Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* from the exercise of foreign criminal jurisdiction.

Article 4
Scope of immunity *ratione personae*

1. Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office.

2. Such immunity *ratione personae* covers all acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office.

3. The cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*.

---

* The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

Part Three
Immunity *ratione materiae*[*]

Article 5
Persons enjoying immunity *ratione materiae*

State officials acting as such enjoy immunity *ratione materiae* from the exercise of foreign criminal jurisdiction.

Article 6
Scope of immunity *ratione materiae*

1. State officials enjoy immunity *ratione materiae* only with respect to acts performed in an official capacity.

2. Immunity *ratione materiae* with respect to acts performed in an official capacity continues to subsist after the individuals concerned have ceased to be State officials.

3. Individuals who enjoyed immunity *ratione personae* in accordance with draft article 4, whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office.

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex

List of treaties referred to in draft article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

---

[*] The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

2. Text of the draft article, with commentary thereto, provisionally adopted by the Commission at its sixty-ninth session

141. The text of the draft article, and the commentary thereto, provisionally adopted by the Commission at its sixty-ninth session, is reproduced below.

Part Two
Immunity *ratione personae*[*]

…

Part Three

Immunity *ratione materiae*[*]

…

Article 7
Crimes under international law in respect of which immunity *ratione materiae* shall not apply

1. Immunity *ratione materiae* from the exercise of foreign criminal jurisdiction shall not apply in respect of the following crimes under international law:

(a) crime of genocide;

(b) crimes against humanity;

(c) war crimes;

(d) crime of *apartheid*;

(e) torture;

(f) enforced disappearance.

2. For the purposes of the present draft article, the crimes under international law mentioned above are to be understood according to their definition in the treaties enumerated in the annex to the present draft articles.

Annex
List of treaties referred to in article 7, paragraph 2

Crime of genocide

- Rome Statute of the International Criminal Court, 17 July 1998, article 6;
- Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, article II.

Crimes against humanity

- Rome Statute of the International Criminal Court, 17 July 1998, article 7.

---

[*] The Commission will consider the procedural provisions and safeguards applicable to the present draft articles at its seventieth session.

War crimes

- Rome Statute of the International Criminal Court, 17 July 1998, article 8, paragraph 2.

Crime of *apartheid*

- International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 30 November 1973, article II.

Torture

- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984: article 1, paragraph 1.

Enforced disappearance

- International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006, article 2.

Commentary

(1) Draft article 7 lists crimes under international law in respect of which immunity from foreign criminal jurisdiction *ratione materiae* shall not apply under the present draft articles. The draft article contains two paragraphs, one that lists the crimes (para. 1) and one that identifies the definition of those crimes (para. 2).

(2) As draft article 7 refers solely to immunity from jurisdiction *ratione materiae*, it is included in Part Three of the draft articles and does not apply in respect of immunity from jurisdiction *ratione personae*, which is regulated in Part Two of the draft articles.

(3) This does not mean, however, that the State officials listed in draft article 3 (Heads of State, Heads of Government and Ministers for Foreign Affairs) will always be exempt from the application of draft article 7. On the contrary, it should be borne in mind that, as the Commission has indicated, Heads of State, Heads of Government and Ministers for Foreign Affairs "enjoy immunity *ratione personae* only during their term of office"[759] and the cessation of such immunity "is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*".[760] In addition, draft article 6, on immunity *ratione materiae*, provides that "[i]ndividuals who enjoyed immunity *ratione personae* ..., whose term of office has come to an end, continue to enjoy immunity with respect to acts performed in an official capacity during such term of office".[761] Accordingly, as this residual immunity is immunity *ratione materiae*, draft article 7 will be applicable to the immunity from jurisdiction enjoyed by a former Head of State, a former Head of Government or a former Minister for Foreign Affairs for acts performed in an official capacity during their term of office. Therefore, such immunity will not apply to these former officials in connection with the crimes under international law listed in paragraph 1 of draft article 7.

(4) Paragraph 1 of draft article 7 lists the crimes which, if committed, would prevent the application of such immunity from criminal jurisdiction to a foreign official, even if those crimes had been committed by the official acting in an official capacity during his or her term of office. Thus, draft article 7 complements the normative elements of immunity from foreign criminal jurisdiction *ratione materiae* as defined in draft articles 5 and 6.

(5) The Commission, by a recorded vote, decided to include this draft article for the following reasons. First, it considered that there has been a discernible trend towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of

---

[759] Draft article 4, paragraph 1. See paragraph (2) of the commentary to draft article 4, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), p. 66.

[760] Draft article 4, paragraph 3. See paragraph (7) of the commentary to draft article 4, *ibid.*, p. 70.

[761] Draft article 6, paragraph 3. See paragraphs (9) to (15) of the commentary to draft article 6, *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 361-363. See also paragraph (4) of the commentary to draft article 5, *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), p. 237.

certain types of behaviour that constitute crimes under international law. This trend is reflected in judicial decisions taken by national courts which, even though they do not all follow the same line of reasoning, have not recognized immunity from jurisdiction *ratione materiae* in relation to certain international crimes.[762] In rare cases, this trend has also been reflected in the adoption of national legislation that provides for exceptions to immunity *ratione materiae* in relation to the commission of international crimes.[763] This trend has also been highlighted in the literature, and has been reflected to some extent in proceedings before international tribunals.[764]

---

[762] See the following cases, which are presented in support of such trend: *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999, [1999] UKHL 17, [2000] 1 AC 147; *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998, *International Law Reports* (ILR), vol. 119, p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000, 2 Zs 1330/99, para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office); *Bouterse*, Netherlands, Amsterdam Court of Appeal, judgment of 20 November 2000, *Netherlands Yearbook of International Law*, vol. 32 (2001), pp. 266 *ff.* (although the Supreme Court subsequently quashed the verdict, it did not do so in relation to immunity but because of the violation of the principle of non-retroactivity and the limited scope of universal jurisdiction; see judgment of 18 September 2001, *International Law in Domestic Courts* [ILDC 80 (NL 2001)]); *Re Sharon and Yaron*, Belgium, Court of Cassation, judgment of 12 February 2003, ILR, vol. 127, p. 123 (although the Court granted immunity *ratione personae* to Ariel Sharon, it tried Amos Yaron, who, at the time the acts were committed, was head of the Israeli armed forces that took part in the Sabra and Shatila massacres); *H. v. Public Prosecutor*, Netherlands, Supreme Court, judgment of 8 July 2008, ILDC 1071 (NL 2008), para. 7.2; *Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008, ILDC 1085 (IT 2008), para. 6; *A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012, BB.2011.140; *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 [2014] EWHC 3419 (Admin.) (the significance of this ruling lies in the fact that it was issued as a "consent order", that is to say, based on an agreement reached between the plaintiffs and the Director of Public Prosecutions, in which the latter agrees that the charges of torture against Prince Nasser are not covered by immunity *ratione materiae*). In a civil proceeding, the Italian Supreme Court has also asserted that State officials who have committed international crimes do not enjoy immunity *ratione materiae* from criminal jurisdiction (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004, ILR, vol. 128, p. 674). In *Jones*, although the House of Lords recognized immunity from civil jurisdiction, it reiterated that immunity from criminal jurisdiction is not applicable in the case of torture (*Jones v. Kingdom of Saudi Arabia*, House of Lords, judgment of 14 June 2006 [2006] UKHL 26, [2007] 1 A.C.). Lastly, it should be noted that the Federal High Court of Ethiopia, albeit in the context of a case pursued against an Ethiopian national, affirmed the existence of a rule of international law preventing the application of immunity to a former Head of State accused of international crimes (*Special Prosecutor v. Hailemariam*, Federal High Court, judgment of 9 October 1995, ILDC 555 (ET 1995)). National courts have in some cases tried officials of another State for international crimes without expressly ruling on immunity. This occurred, for example, in the *Barbie* case before the French courts: *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, France, Court of Cassation, judgments of 6 October 1983, 26 January 1984 and 20 December 1985, ILR, vol. 78, p. 125; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and others v. Barbie*, Rhone Court of Assizes, judgment of 4 July 1987, ILR, vol. 78, p. 148, and Court of Cassation, judgment of 3 June 1988, ILR, vol. 100, p. 330. Meanwhile, the National High Court of Spain has tried various foreign officials for international crimes without deeming it necessary to rule on immunity, in the *Pinochet*, *Scilingo*, *Cavallo*, *Guatemala*, *Rwanda* and *Tibet* cases. In the *Rwanda* case, however, the National High Court ruled against the prosecution of President Kagame on the grounds that he enjoyed immunity. Similarly, in the *Tibet* case, the National High Court ruled against the prosecution of the then President Hu Jintao, however, following the end of the latter's term as President of China, the Central Court of Investigation No. 2 of the National High Court allowed his prosecution by order of 9 October 2013, claiming that he no longer enjoyed "diplomatic immunity".

[763] In support of this position, attention has been drawn to Organic Act No. 16/2015 of 27 October, on the privileges and immunities of foreign States, the international organizations based in Spain and international conferences and meetings held in Spain, which establishes a separate regime of immunity for Heads of State, Heads of Government and Ministers for Foreign Affairs, according to which, in respect of "acts performed in the exercise of official functions [by the officials in question] during a term in office, genocide, forced disappearance, war crimes and crimes against humanity shall be excluded from immunity" (art. 23, para. 1, *in fine*). Also of interest is Act No. 24488 of Argentina, on foreign State immunity, article 3 of which was excluded by Decree No. 849/95 promulgating the Act, with the result that the Argentine courts may not decline to hear a claim against a State for

---

violation of international human rights law. Meanwhile, from a far more limited perspective, the United States Foreign Sovereign Immunities Act, as amended by the Torture Victim Protection Act, establishes a "terrorism exception to the jurisdictional immunity of a foreign State" (section 1605A), which makes it possible to exclude the application of immunity for certain types of acts such as torture or extrajudicial executions, provided that they were carried out by officials of a State previously designated by the competent authorities of the United States as a "State sponsor of terrorism". A similar exception is contained in the State Immunity Act of Canada. Lastly, it should be borne in mind that some limitations or exceptions to immunity in relation to international crimes are contained in national legislation concerning such crimes, either in separate laws (see the Belgian Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003; the 2003 International Crimes Act of the Netherlands; or the Criminal Code of the Republic of the Niger, as amended in 2003) or in legislation implementing the Rome Statute of the International Criminal Court. For implementing legislation that establishes a general exception to immunity, see: Burkina Faso, Act No. 50 of 2009 on the determination of competence and procedures for application of the Rome Statute of the International Criminal Court by the jurisdictions of Burkina Faso, arts. 7 and 15.1 (according to which the Burkina Faso courts may exercise jurisdiction with respect to persons who have committed a crime that falls within the competence of the Court, even in cases where it was committed abroad, provided that the suspect is in their territory. Moreover, official status shall not be grounds for exception or reduction of responsibility); Comoros, Act No. 11-022 of 13 December 2011 concerning the application of the Rome Statute, art. 7.2 ("the immunities or special rules of procedure accompanying the official status of a person by virtue of the law or of international law shall not prevent national courts from exercising their competence with regard to that person in relation to the offences specified in this Act"); Ireland, International Criminal Court Act 2006, art. 61.1 ("In accordance with article 27, any diplomatic immunity or state immunity attaching to a person by reason of a connection with a state party to the Statute is not a bar to proceedings under this Act in relation to the person"); Mauritius, International Criminal Court Act 2001, art. 4; South Africa, Act No. 27 of 18 July 2002 implementing the Rome Statute of the International Criminal Court, arts. 4 (2) (a) (i) and 4 (3) (c) (stating that South African courts are competent to prosecute crimes of genocide, crimes against humanity and war crimes when the alleged perpetrator is in South Africa and that any official status claimed by the accused is irrelevant). For implementing legislation that establishes procedures for consultation or limitations only in relation to the duty to cooperate with the International Criminal Court, see: Argentina, Act No. 26200 implementing the Rome Statute of the International Criminal Court, adopted by Act No. 25390 and ratified on 16 January 2001, arts. 40 and 41; Australia, International Criminal Court Act No. 41 of 2002, art. 12.4; Austria, Federal Act No. 135 of 13 August 2002 on cooperation with the International Criminal Court, arts. 9.1 and 9.3; Canada, 1999 Extradition Act, art. 18; France, Code of Criminal Procedure (under Act No. 2002-268 of 26 February 2002), art. 627.8; Germany, Courts Constitution Act, arts. 20.1 and 21; Iceland, 2003 Act on the International Criminal Court, art. 20.1; Ireland, 2006 International Criminal Court Act No. 30, art. 6.1; Kenya, Act No. 16 of 2008 on International Crimes, art. 27; Liechtenstein, Act of 20 October 2004 on cooperation with the International Criminal Court and other international tribunals, art. 10.1 (b) and (c); Malta, Extradition Act, art. 26S.1; Norway, Act No. 65 of 15 June 2001 concerning implementation of the Rome Statute of the International Criminal Court of 17 July 1998 in Norwegian law, art. 2; New Zealand, International Crimes and International Criminal Court Act 2000, art. 31.1; United Kingdom, International Criminal Court Act 2001, art. 23.1; Samoa, Act No. 26 of 2007 on the International Criminal Court, arts. 32.1 and 41; Switzerland, Act on Cooperation with the International Criminal Court, art. 6; and Uganda, Act No. 18 of 2006 on the International Criminal Court, art. 25.1 (a) and (b). Denmark is a special case: its Act of 16 May 2001 on the International Criminal Court (art. 2) attributes the settlement of questions on immunity to the executive branch without defining a specific system for consultations.

[764] The existence of a trend towards limiting immunity for international crimes was noted by Judges Higgins, Kooijmans and Buergenthal in their joint separate opinion in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 3, at p. 88, para. 85. For its part, the European Court of Human Rights, in *Jones and Others v. the United Kingdom*, expressly recognized that there appeared to be "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture", and that, "in light of the developments currently underway in this area of public international law, this is a matter which needs to be kept under review by Contracting States" (*Jones and Others v. the United Kingdom*, Applications Nos. 34356/06 and 40528/06, judgment of 2 June 2014, ECHR 2014, paras. 213 and 215).

(6) Second, the Commission also took into account the fact that the draft articles on immunity of State officials from foreign criminal jurisdiction are intended to apply within an international legal order whose unity and systemic nature cannot be ignored. Therefore, the Commission should not overlook other existing standards or clash with the legal principles enshrined in such important sectors of contemporary international law as international humanitarian law, international human rights law and international criminal law. In this context, the consideration of crimes to which immunity from foreign criminal jurisdiction does not apply must be careful and balanced, taking into account the need to preserve respect for the principle of the sovereign equality of States, to ensure the implementation of the principles of accountability and individual criminal responsibility and to end impunity for the most serious international crimes, which is one of the primary objectives of the international community. Striking this balance will ensure that immunity fulfils the purpose for which it was established (to protect the sovereign equality and legitimate interests of States) and that it is not turned into a procedural mechanism to block all attempts to establish the criminal responsibility of certain individuals (State officials) arising from the commission of the most serious crimes under international law.

(7) In the light of the above two reasons, the Commission considers that it must pursue its mandate of promoting the progressive development and codification of international law by applying both the deductive method and the inductive method. It is on this premise that the Commission has included in draft article 7 a list of crimes to which immunity *ratione materiae* shall not apply for the following reasons: (a) they are crimes which in practice tend to be considered as crimes not covered by immunity *ratione materiae* from foreign criminal jurisdiction; and (b) they are crimes under international law that have been identified as the most serious crimes of concern to the international community, and there are international, treaty-based and customary norms relating to their prohibition, including an obligation to take steps to prevent and punish them.

(8) However, some members disagreed with this analysis. First, they opposed draft article 7, which had been adopted by vote, stating that: (a) the Commission should not portray its work as possibly codifying customary international law when, for reasons indicated in the footnotes below, it is clear that national case law,[765] national statutes,[766] and

---

[765] Those members noted that only nine cases are cited (see footnote 762 above) that purportedly expressly address the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law, and that most of those cases actually provide no support for the proposition that such immunity is to be denied. For example, in the United Kingdom case of *Regina v. Bow Street Metropolitan Stipendiary Magistrate*, immunity was denied only with respect to acts falling within the scope of a treaty in force that was interpreted as waiving immunity (the Convention against Torture). The German case of *In re Hussein* did not concern any of the crimes listed in draft article 7, and the judgment did not assert, in relation to the hypothesis that the then President Hussein had ceased to hold office, that immunity *ratione materiae* from jurisdiction was not or should not be recognized in that instance. The *Bouterse* case was not upheld by the Netherlands Supreme Court and the reasoning of the lower court on immunity remained an untested *obiter dictum*. The Belgian decision in *Re Sharon and Yaron* was controversial and led the Parliament thereafter to alter Belgian law, resulting in the Court of Cassation affirming a lack of jurisdiction over the case. The same law was at issue in *Re Pinochet* before the Court of First Instance of Brussels. In the case of *Lozano v. Italy*, the foreign State official was accorded, not denied, immunity *ratione materiae*. The case *Special Prosecutor v. Hailemariam* concerned prosecution by Ethiopia of one of its own nationals, not of a foreign State official. Other cases cited concern situations where immunity has not been invoked, or has been waived; they provide no support for the proposition that a State official does not enjoy immunity *ratione materiae* from foreign criminal jurisdiction under customary international law if such immunity is invoked. Further, those members noted that the relevance for the topic of *civil* cases in national courts must be carefully considered; to the extent they are relevant, they tend not to support the exceptions asserted in draft article 7. For example, the case *Ferrini v. Federal Republic of Germany* (see footnote 762 above) was found by the International Court of Justice as to be inconsistent with the obligations of Italy under international law. See *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99. In the case of *Jones v. Kingdom of Saudi Arabia* (see footnote 762 above), the House of Lords recognized the immunity of the State official. By contrast, in addition to those cases indicated above, those members pointed to several cases where immunity *ratione materiae* has been invoked and

treaty law[767] do not support the exceptions asserted in draft article 7; (b) the relevant practice showed no "trend", temporal or otherwise, in favour of exceptions to immunity *ratione materiae* from foreign criminal jurisdiction; (c) immunity is a procedural matter and, consequently, (i) it is not possible to assume that the existence of criminal responsibility for any crimes under international law committed by a State official automatically precludes immunity from foreign criminal jurisdiction; (ii) immunity does not depend on the gravity of the act in question or on the fact that such act is prohibited by the peremptory norm of international law; (iii) the issue of immunity must be considered at an early stage of the exercise of jurisdiction, before the case is considered on the merits;[768] (d) the lack of immunity before an international criminal court is not relevant to the issue of immunity from the jurisdiction of national courts; and (e) the establishment of a new system of exceptions to immunity, if not agreed upon by treaty, will likely harm inter-State relations and risks undermining the international community's objective of ending impunity for the most serious international crimes. Furthermore, these members took the view that the Commission, by proposing draft article 7, was conducting a "normative policy" exercise that bore no relation to either the codification or the progressive development of international law. For those members, draft article 7 is a proposal for "new law" that cannot be considered as either *lex lata* or desirable progressive development of international law. Second, those members of the Commission also stressed the difference between procedural immunity from foreign jurisdiction, on the one hand, and substantive criminal responsibility, on the other, and maintained that the recognition of exceptions to immunity was neither required nor necessarily appropriate for achieving the required balance. Rather, in the view of those members, impunity can be avoided in situations where a State official

---

accepted by national courts in criminal proceedings. See, for example, Senegal, *Prosecutor v. Hissène Habré*, Court of Appeal of Dakar, judgment of 4 July 2000, and Court of Cassation, judgment of 20 March 2001; ILR vol. 125, pp. 571-577 (immunity accorded to former head of State); Germany, *Jiang Zemin*, decision of the Federal Prosecutor General of 24 June 2005, 3 ARP 654/03-2 (same).

[766] These members noted that very few national laws addressed the issue of immunity *ratione materiae* of a State official from foreign criminal jurisdiction under customary international law. As acknowledged in the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), para. 42: "Immunity of the State or of its officials from jurisdiction is not explicitly regulated in most States. On the contrary, the response to immunity has been left to the courts". Of the few national laws that purportedly address such immunity (Burkina Faso, Comoros, Ireland, Mauritius Niger, Spain, South Africa), none support draft article 7 as it is written. For example, the Spanish Organic Act No. 16/2015 of 27 October, art. 23, para. 1, only addresses the immunity *ratione materiae* of former Heads of State, Heads of Government and Ministers for Foreign Affairs. Statutes such as the Repression of Serious Violations of International Humanitarian Law Act, as amended in 2003, of Belgium or the 2003 International Crimes Act of the Netherlands, only provide that immunity shall be denied as recognized under international law, without any further specification. Further, those members observed that national laws implementing an obligation to surrender a State official to the International Criminal Court, arising under the Rome Statute or a decision by the Security Council, are not relevant to the issue of immunity of a State official under customary international law from foreign criminal jurisdiction. Also irrelevant are national laws focused on the immunity of States, such as Act No. 24488 of Argentina, the Foreign Sovereign Immunities Act of the United States, and the State Immunity Act of Canada (further, it was noted that the Foreign Sovereign Immunities Act was not amended by the Torture Victim Protection Act, which has nothing to do with terrorism).

[767] These members noted that none of the global treaties addressing specific types of crimes (e.g., genocide, war crimes, *apartheid*, torture, enforced disappearance) contain any provision precluding immunity *ratione materiae* of State officials from foreign criminal jurisdiction, nor do any of the global treaties addressing specific types of State officials (e.g., diplomats, consular officials, officials on special mission).

[768] See, for example, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above), p. 137, para. 84 ("customary international law does not treat a State's entitlement to immunity as dependent upon the gravity of the act of which it is accused or the peremptory nature of the rule which it is alleged to have violated"); *Arrest Warrant of 1 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002*, p. 25, para. 60 ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law").

is prosecuted in his or her own State; is prosecuted in an international court; or is prosecuted in a foreign court after waiver of the immunity. Asserting exceptions to immunity that States have not accepted by treaty or through their widespread practice risks creating severe tensions, if not outright conflict, among States whenever one State exercises criminal jurisdiction over the officials of another based solely on an allegation that a heinous crime has been committed.

(9) It should be borne in mind that these members also expressed the view that no decision can be taken on the issue of limitations and exceptions to immunity until the Commission has taken a position on the issue of procedural safeguards. This opinion was not, however, accepted by the majority of Commission members, who, while recognizing the importance of clearly defining procedural safeguards to prevent abuse in the exercise of foreign criminal jurisdiction over State officials, took the view that the issue of the crimes to which immunity from jurisdiction *ratione materiae* does not apply can be dealt with separately at the present stage of the Commission's work. Nevertheless, in order to reflect the great importance attached by the Commission to procedural issues in the context of the present topic, it was agreed that the current text of the draft articles should include the following footnote: "At its seventieth session, the Commission will consider the procedural provisions and safeguards applicable to the present draft articles." The footnote marker was inserted after the headings of Part Two (Immunity *ratione personae*) and Part Three (Immunity *ratione materiae*) of the draft articles, since procedural provisions and safeguards may refer to both categories of immunity, and should also be considered in relation to the draft articles as a whole.

Paragraph 1

(10) Paragraph 1 (a)-(f) of draft article 7 lists the crimes under international law which, if allegedly committed, would prevent the application of immunity from criminal jurisdiction to a foreign official, even if the official committed those crimes while acting in an official capacity during his or her term of office. The crimes are as follows: the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance.

(11) The chapeau of the draft article uses the phrase "shall not apply" in order to reflect the fact that in both practice and doctrine two different interpretations have been followed with regard to whether or not such crimes are to be considered "acts performed in an official capacity". One view is that the commission of such crimes can never be considered a function of the State and they therefore cannot be regarded as "acts performed in an official capacity". The contrary view holds that crimes under international law either require the presence of a State element (torture, enforced disappearance) or else must have been committed with the backing, express or implied, of the State machinery, so that there is a connection with the State, and such crimes can therefore be considered in certain cases as "acts performed in an official capacity".[769] Although the Commission did not find it necessary to come down in favour of one or the other of these interpretations, it noted that some national courts have not applied immunity *ratione materiae* in the exercise of their criminal jurisdiction in respect of these crimes under international law, either because they do not regard them as an act performed in an official capacity or a characteristic function of the State,[770] or because they take the view that, although crimes under international law may constitute such an act or function, such crimes (by virtue of their gravity or because they

---

[769] See, for example, *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening)* (see footnote 765 above), p. 125, para. 60 (discussing *acta jure imperii* in the context of State immunity).

[770] See, for example, the following cases: *Re Pinochet*, Belgium, Court of First Instance of Brussels, judgment of 6 November 1998 (see footnote 762 above), p. 349; *In re Hussein*, Germany, Higher Regional Court of Cologne, judgment of 16 May 2000 (see footnote 762 above), para. 11 (makes this assertion in relation to the hypothesis that the then President Hussein had ceased to hold office). A similar argument has also been used in some cases when the question of immunity has been raised before the civil courts. See, for example, *Prefecture of Voiotia* v. *Federal Republic of Germany*, Court of First Instance of Livadeia (Greece), judgment of 30 October 1997.

contravene peremptory norms) may not give rise to recognition of the perpetrator's immunity from criminal jurisdiction.[771]

(12) Therefore, bearing in mind that, in practice, the same crime under international law has sometimes been interpreted as a limitation (absence of immunity) or as an exception (exclusion of existing immunity), the Commission considered it preferable to address the topic in terms of the effects resulting from each of these approaches, namely, the non-applicability to such crimes of immunity *ratione materiae* from foreign criminal jurisdiction that otherwise might be enjoyed by a State official. The Commission opted for this formulation for reasons of clarity and certainty, in order to provide a list of crimes which, even if committed by a State official, would preclude the possibility of immunity from foreign criminal jurisdiction.

(13) To that end, the Commission used the phrase "immunity ... shall not apply", following, *mutatis mutandis*, the technique once used by the Commission in relation to jurisdictional immunity of the State, when it used the phrase "proceedings in which State immunity cannot be invoked" in a similar context.[772] However, in draft article 7, the Commission decided not to use the phrase "cannot be invoked" in order to avoid the procedural component of that phrase, preferring instead to use the neutral phrase "shall not apply".

(14) The expression "from the exercise of foreign criminal jurisdiction" is included in the chapeau for consistency with the formulation used in draft articles 3 and 5, as provisionally adopted by the Commission.

(15) The expression "crimes under international law" refers to conduct that is criminal under international law whether or not such conduct has been criminalized under national law. The crimes listed in draft article 7 are the crimes of greatest concern to the international community as a whole; there is a broad international consensus on their definition as well as on the existence of an obligation to prevent and punish them. These crimes have been addressed in international treaties and are also prohibited by customary international law.

(16) The expression "crimes under international law" was used previously by the Commission in the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal[773] and in the 1954 draft Code of

---

[771] As happened, for example, in the case of *Eichmann*, Israel, Supreme Court, judgment of 29 May 1962, ILR, vol. 36, pp. 309-310. In the *Ferrini* case, the Italian courts based their ruling on both the gravity of the crimes committed and the fact that the conduct in question was contrary to *jus cogens* norms (*Ferrini v. Federal Republic of Germany*, Court of Cassation, judgment of 11 March 2004 (see footnote 762 above), p. 674). In the *Lozano* case, the Italian Court of Cassation based its denial of immunity on the violation of fundamental rights, which have the status of *jus cogens* norms and must therefore take precedence over the rules governing immunity (*Lozano v. Italy*, Italy, Court of Cassation, judgment of 24 July 2008 (see footnote 762 above), para. 6). In *A. v. Office of the Public Prosecutor of the Confederation*, the Federal Criminal Court of Switzerland based its decision on the existence of a customary prohibition of international crimes that the Swiss legislature considers to be *jus cogens*; it also pointed out the contradiction between prohibiting such conduct and continuing to recognize immunity *ratione materiae* that would prevent the launch of an investigation (*A. v. Office of the Public Prosecutor of the Confederation*, Switzerland, Federal Criminal Court, judgment of 25 July 2012 (see footnote 762 above)).

[772] Draft articles on jurisdictional immunities of States and their property, adopted by the Commission at its forty-third session, *Yearbook of the International Law Commission, 1991*, p. 33. The Commission used the phrase cited above as the title of part III of those draft articles and reiterated a variant (the "State cannot invoke") in articles 10 to 17 in the same part. For an explanation of the reasons that led the Commission to use this phrase, see, in particular, paragraph (1) of the general commentary to part III (p. 33) and paragraphs (1) to (5) of the commentary to article 10 (pp. 33-34). The United Nations Convention on Jurisdictional Immunities of States and Their Property, done at New York on 2 December 2004 (General Assembly resolution 59/38, annex), likewise uses the phrase "Proceedings in which State immunity cannot be invoked" in the title of part III and the variant "the State cannot invoke" in articles 10 to 17.

[773] See principle I of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal: "Any person who commits an act which constitutes a

Offences against the Peace and Security of Mankind.[774] In this context, the Commission took the view that the use of the expression "crimes under international law" means that "international law provides the basis for the criminal characterization" of such crimes and that "the prohibition of such types of behaviour and their punishability are a direct consequence of international law".[775] What follows from this is "the autonomy of international law in the criminal characterization" of such crimes[776] and the fact that "the characterization, or the absence of characterization, of a particular type of behaviour as criminal under national law has no effect on the characterization of that type of behaviour as criminal under international law".[777] Accordingly, the use of the expression "crimes under international law" directly links the list of crimes contained in paragraph 1 of draft article 7 to international law and ensures that the definition of such crimes is understood in accordance with international standards, and any definition established under domestic law to identify cases in which immunity does not apply is irrelevant.

(17) The category of crimes under international law includes (a) the crime of genocide, (b) crimes against humanity and (c) war crimes. The Commission included these crimes among the crimes in respect of which immunity does not apply for two basic reasons. First, these are crimes about which the international community has expressed particular concern, resulting in the adoption of treaties that are at the heart of international criminal law, international human rights law and international humanitarian law, and the international courts have emphasized not only the gravity of these crimes, but also the fact that their prohibition is customary in nature and that committing them may constitute a violation of peremptory norms of general international law (*jus cogens*). Second, these crimes arise, directly or indirectly, in the judicial practice of States in relation to cases in which the issue of immunity *ratione materiae* has been raised. Lastly, it should be noted that these three crimes are included in article 5 of the Rome Statute of the International Criminal Court, where they are described as "the most serious crimes of concern to the international community as a whole".[778] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(18) The Commission decided not to include the crime of aggression at this time, even though it too is included in article 5 of the Rome Statute and is characterized as a crime under the amendments adopted at the Review Conference of the Rome Statute held in Kampala in 2010.[779] The Commission took this decision in view of the nature of the crime of aggression, which would require national courts to determine the existence of a prior act of aggression by the foreign State, as well as the special political dimension of this type of

---

crime under international law is responsible therefor and liable to punishment" (*Yearbook … 1950*, vol. II, document A/1316, p. 374).

[774] See article 1 of the draft Code of Offences against the Peace and Security of Mankind adopted in 1954: "Offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished" (*Yearbook … 1954*, vol. II, document A/2693, p. 150). For its part, article 1, paragraph 2, of the draft Code of Crimes against the Peace and Security of Mankind adopted by the Commission in 1996 states that: "Crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law" (*Yearbook … 1996*, vol. II (Part Two), p. 17).

[775] See paragraph (6) of the commentary to article 1 of the 1996 draft Code of Crimes against the Peace and Security of Mankind (*Yearbook … 1996*, vol. II (Part Two), p. 17).

[776] *Ibid.*, para. (9), p. 18.

[777] *Ibid.*, para. (10). It should be borne in mind that the Commission, in commenting on principle I of the Nürnberg principles, had stated that: "The general rule underlying Principle I is that international law may impose duties on individuals directly without any interposition of internal law" (*Yearbook … 1950*, vol. II, document A/1316, p. 374, para. 99).

[778] Rome Statute of the International Criminal Court (Rome, 17 July 1998), United Nations, *Treaty Series*, vol. 2187, No. 38544, p. 3, art. 5, para. 1, and preamble, fourth paragraph.

[779] See the definition of aggression in article 8 *bis*, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May-11 June 2010*, publication of the International Criminal Court, RC/9/11, resolution 6, "The crime of aggression" (RC/Res.6).

crime,[780] given that it constitutes a "crime of leaders"; and also in view of the fact that the Assembly of States Parties to the Rome Statute of the International Criminal Court has not taken a decision to activate the Court's jurisdiction over this crime. However, some members stated that the crime of aggression should have been included in paragraph 1 of draft article 7, as it is the most serious of the crimes under international law, it was previously included by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind[781] and it is one of the crimes covered by the Rome Statute. Furthermore, a substantial number of States have included the crime of aggression within their national criminal law.[782] Accordingly, they expressed their opposition to the majority decision of the Commission and reserved their position on the matter.

(19) On the other hand, the Commission considered it necessary to include in paragraph 1 of draft article 7 the crimes of (d) *apartheid*, (e) torture and (f) enforced disappearance as separate categories of crimes under international law in respect of which immunity does not apply. Although these crimes are included in article 7 of the Rome Statute under the category of crimes against humanity,[783] the Commission took into account the following elements to consider them as separate crimes. First, the crimes of *apartheid*, torture and enforced disappearance have been the subject of international treaties that establish a special legal regime for each crime for the purposes of prevention, suppression and

---

[780] In this regard, it should be borne in mind that in the commentaries to the 1996 draft Code of Crimes against the Peace and Security of Mankind, the Commission stated the following: "The aggression attributed to a State is a *sine qua non* for the responsibility of an individual for his participation in the crime of aggression. An individual cannot incur responsibility for this crime in the absence of aggression committed by a State. Thus, a court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression by a State. The determination by a national court of one State of the question of whether another State had committed aggression would be contrary to the fundamental principle of international law *par in parem imperium non habet*. Moreover, the exercise of jurisdiction by the national court of a State which entails consideration of the commission of aggression by another State would have serious implications for international relations and international peace and security." (*Yearbook … 1996*, vol. II (Part Two), p. 30, para. (14) of commentary to article 8).

[781] *Ibid.*, pp. 42-43 (art. 16).

[782] The following are examples of national legislation that include the crime of aggression: Austria, Criminal Code § 321k, No. 60/1974 of 23 January 1974, as amended by BGBl. I No. 112/2015 of 13 August 2015; Azerbaijan, Criminal Code of 2000, arts. 100-101; Bangladesh, International Crimes (Tribunals) Act, art. 3, International Crimes (Tribunals) Act No. XIX of 1973, as amended by the International Crimes (Tribunals) (Amendment) Act No. LV of 2009 and Act No. XXI of 2012; Belarus, Criminal Code, arts. 122-123, Law No. 275-Z of 9 July 1999 (as amended on 28 April 2015); Bulgaria, Criminal Code, arts. 408-409, *State Gazette*, No. 26 of 2 April 1968, as amended by *State Gazette*, No. 32 of 27 April 2010; Croatia, Criminal Code, arts. 89, 157, *Official Gazette of the Republic of Croatia "Narodne novine"*, No. 125/11; Cuba, Criminal Code, arts. 114-115, Código Penal, Ley No. 62 de 29 de diciembre de 1987, modificada por la Ley N° 87 de 16 de febrero de 1999; Ecuador, Criminal Code, art. 88; Estonia, Criminal Code, §§ 91-92; Finland, Criminal Code of Finland, Act No. 39/1889 as amended by Act No. 1718/2015, §§ 4 (a), 4 (b), 14 (a); Germany, Criminal Code, Strafgesetzbuch vom 13. November 1998 (BGBl); Luxembourg, Criminal Code, art. 136; Macedonia, Criminal Code, art. 415; Malta, Criminal Code § 82(C), Criminal Code of the Republic of Malta (1854, as amended 2004); Republic of Moldova, Criminal Code of the Republic of Moldova, arts. 139-140, adopted by Law No. 985-XV on 18 April 2002 (as amended 2009); Mongolia, Criminal Code of Mongolia (2002), art. 297; Montenegro, Criminal Code, art. 442, *Official Gazette of the Republic of Montenegro*, No. 70/2003, Correction, No. 13/2004; Paraguay, Codigo Penal de la Republica del Paraguay, art. 271, Ley No. 1.160/97; Poland, Criminal Code, art. 17, Law of 6 June 1997; Russia, Criminal Code, The Criminal Code of the Russian Federation, arts. 353-354, Federal Law No. 64-FZ of 13 June 1996 (as amended); Samoa, International Criminal Court Act 2007, as amended by Act 2014, § &A, No. 23; Slovenia, Criminal Code of 2005, arts 103 and 105; Tajikistan, Criminal Code of the Republic of Tajikistan, art. 395-396; Timor-Leste Criminal Code of the Democratic Republic of Timor-Leste, Decree Law No. 19/2009, art. 134. See, for discussion, A. Reisinger Coracini, "National legislation on individual criminal responsibility for conduct amounting to aggression' in *International Criminal Justice: Law and Practice from the Rome Statute to Its Review National Legislation on Individual Responsibility for Conduct Amounting to Aggression*, R. Bellelli, ed. (Abingdon and New York, Routledge, 2016).

[783] Rome Statute, art. 7, para. 1, subparas. (j), (f) and (i), respectively.

punishment,[784] which imposes specific obligations on States to take certain measures in their domestic legislation, including the obligation to define such crimes in their national criminal legislation and to take the necessary measures to ensure that their courts are competent to try such crimes.[785] It should be added that the treaties in question establish systems of international cooperation and judicial assistance between States.[786] Second, the Commission also noted that the crimes of *apartheid*, torture and enforced disappearance are subject under the Rome Statute to a specific threshold that is defined as the commission of such crimes "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack",[787] which, however, does not exist in the instruments specifically related to these crimes. Third, the Commission observed that the conventions against torture and enforced disappearance expressly establish that such acts can only be committed by State officials or at their instigation or with their support or acquiescence.[788] In addition, the Commission took into account the fact that, in many cases, when national courts have dealt with these crimes in relation to immunity, they have done so by treating them as separate crimes. The treatment of torture is a good example of this.[789] Some members noted, however, that the inclusion of those crimes in draft article 7 found little if any support in practice, in national and international jurisprudence or in national legislation.

(20) While some members of the Commission suggested that the list should include other crimes such as slavery, terrorism, human trafficking, child prostitution and child pornography, and piracy, which are also the subject of international treaties that establish special legal regimes for each crime for the purposes of prevention, suppression and punishment, the Commission decided not to include them. In doing so, it took into account the fact that these crimes either are already covered by the category of crimes against humanity or do not fully correspond to the definition of crimes under international law *stricto sensu*, being more correctly described in most cases as transnational crimes. In addition, such crimes are usually committed by non-State actors and are not reflected in national judicial practice relating to immunity from jurisdiction. In any event, the non-inclusion of other international crimes in draft article 7 should not be taken to mean that the Commission underestimates the seriousness of such crimes.

(21) Lastly, it should be noted that the Commission did not include in draft article 7, paragraph 1, the crimes of corruption or crimes affected by the so-called "territorial tort

---

[784] See the International Convention on the Suppression and Punishment of the Crime of *Apartheid* (New York, 30 November 1973), United Nations, *Treaty Series*, vol. 1015, No. 14861, p. 243; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York, 10 December 1984), *ibid.*, vol. 1465, No. 24841, p. 85 (hereinafter "Convention against Torture"); and the International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006), *ibid.*, vol. 2716, No. 48088, p. 3.

[785] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. IV; Convention against Torture, arts. 4 to 6; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 4, 6 and 9.

[786] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. XI; Convention against Torture, arts. 6-9; International Convention for the Protection of All Persons from Enforced Disappearance, arts. 10, 11, 13 and 14.

[787] Rome Statute, art. 7, para. 1. The definition of the threshold is contained in article 7, paragraph 2 (a).

[788] Convention against Torture, art. 1, para. 1; International Convention for the Protection of All Persons from Enforced Disappearance, art. 2.

[789] As in the case, for example, of the United Kingdom, where cases relating to immunity from jurisdiction *ratione materiae* which raised the question of the non-applicability of such immunity to acts of torture have been based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. See *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, House of Lords, United Kingdom, 24 March 1999 (see footnote 762 above); *FF v. Director of Public Prosecutions* (Prince Nasser case), High Court of Justice, Queen's Bench Division, Divisional Court, judgment of 7 October 2014 (see footnote 762 above). The Convention against Torture also served as the basis of a matter related to immunity from civil jurisdiction: *Jones v. Saudi Arabia*, House of Lords, judgment of 14 June 2006 (see footnote 762 above).

exception" proposed by the Special Rapporteur.[790] This does not mean, however, that the Commission considers that immunity from foreign criminal jurisdiction *ratione materiae* should apply to these two categories of crimes.

(22) With regard to corruption (understood as "grand corruption"), several members of the Commission pointed out that crimes of corruption are especially serious as they directly affect the interests and stability of the State, the well-being of its population and even its international relations. Consequently, those members were in favour of including an exception to immunity *ratione materiae*. However, other members of the Commission argued that, while the seriousness of the crime of corruption cannot be called into question, its inclusion in draft article 7 posed a problem, related essentially to the general nature of the term "corruption" and the wide range of acts that can be included in this category, as well as the fact that, in their view, treaty practice and case law do not provide sufficient grounds for including such crimes among the limitations and exceptions to immunity. Other members questioned whether corruption met the test of gravity of the other crimes listed in draft article 7. Lastly, several members of the Commission pointed out that corruption cannot under any circumstances be regarded as an act performed in an official capacity and therefore need not be included among the crimes for which immunity does not apply.

(23) Especially in view of that last argument, the Commission decided not to include crimes of corruption in draft article 7, on the grounds that they do not constitute "acts performed in an official capacity", but are acts carried out by a State official solely for his or her own benefit.[791] Although some members of the Commission pointed out that the involvement of State officials in such acts cannot be ignored, because it is precisely their official status that facilitates and makes possible the crime of corruption, some members of the Commission took the view that the fact that the crime is committed by an official does not change the nature of the act, which remains an act performed for the official's own benefit even if the official uses State facilities that might give the act a semblance of official status. Accordingly, since the normative element contained in draft article 6, paragraph 1, does not apply to the crime of corruption, several members of the Commission took the view that immunity from jurisdiction *ratione materiae* does not exist in relation to the crime of corruption and therefore the latter does not need to be included in the list of crimes for which immunity does not apply.[792]

(24) The Commission also considered the case of other crimes committed by a foreign official in the territory of the forum State without that State's consent to both the official's presence in its territory and the activity carried out by the official that gave rise to the commission of the crime (territorial exception). This scenario differs in many respects from the crimes under international law included in paragraph 1 of draft article 7 or the crime of corruption. Although the view was expressed that immunity could exist in these circumstances and the exception should not be included in draft article 7 because there was insufficient practice to justify doing so, the Commission decided not to include it in the draft article for other reasons. The Commission considers that certain crimes,[793] such as murder, espionage, sabotage or kidnapping, committed in the territory of a State in the aforementioned circumstances are subject to the principle of territorial sovereignty and do not give rise to immunity from jurisdiction *ratione materiae*, and therefore there is no need to include them in the list of crimes for which this type of immunity does not apply. This is without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, as set forth in draft article 1, paragraph 2.

---

[790] See the Special Rapporteur's fifth report on immunity of State officials from foreign criminal jurisdiction (A/CN.4/701), paras. 225-234.

[791] In the same vein, see paragraphs (3) and (5) of the commentary to draft article 2 (f), dealing with the definition of an "act performed in an official capacity", *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), pp. 354-355.

[792] *Ibid.*, para. (13), p. 358.

[793] Referring to an exception in the context of State immunity, see *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (see footnote 765 above).

Paragraph 2 and annex

(25) Paragraph 2 of draft article 7 establishes a link between paragraph 1 of the article and the annex to the draft articles, entitled "List of treaties referred to in draft article 7, paragraph 2". While the concept of "crimes under international law" and the concepts of "crime of genocide", "crimes against humanity", "war crimes", "crime of *apartheid*", "torture" and "enforced disappearance" belong to well established categories in contemporary international law, the Commission is mindful that the fact that draft article 7 refers to "crimes" means that the principle of legal certainty characteristic of criminal law must be preserved and tools must be provided to avoid subjectivity in identifying what is meant by each of the aforementioned crimes.

(26) However, the Commission did not consider it necessary to define the crime of genocide, crimes against humanity, war crimes, the crime of *apartheid*, torture and enforced disappearance, as this is not part of its mandate within the framework of the present draft articles. On the contrary, the Commission found it preferable to simply identify the treaty instruments that define the aforementioned categories, for inclusion in a list that will enable legal practitioners to act with greater certainty in applying draft article 7. The outcome of this exercise is the list contained in the annex to the draft articles.

(27) As indicated in paragraph 2 of draft article 7, the linkage of each crime with the treaties listed in the annex is only for the purposes of draft article 7 on the immunity of State officials from foreign criminal jurisdiction, in order to identify the definitions of the crimes listed in paragraph 1 of the article without assuming or requiring that States must be parties to those instruments.

(28) On the other hand, it should be borne in mind that the listing of certain treaties has no effect on the customary nature of these crimes, as recognized under international law, or on the specific obligations that may arise from those treaties for States parties. Similarly, the inclusion of only some of the treaties that define the crimes in question has no effect on other treaties that define or regulate the same crimes, whose definitions and legal regimes remain intact for States parties in their application of those treaties. In conclusion, the reference to a specific treaty for the definition of each of the crimes listed in paragraph 1 of draft article 7 is included for reasons of convenience and appropriateness and solely for the purposes of draft article 7 and in no way affects the other rules of customary or treaty-based international law that refer to such crimes and that contain legal regimes of general scope for each of them.

(29) The choice of treaties whose articles are included in the annex to provide a definition of the various crimes under international law was based on three fundamental criteria: (a) the desire to avoid possible confusion when several treaties use different language to define the same crime; (b) the selection of treaties that are universal in scope; and (c) the selection of treaties providing the most up-to-date definitions available.

(30) Genocide was defined for the first time in the Convention on the Prevention and Punishment of the Crime of Genocide[794] and its definition has remained constant in contemporary international criminal law, notably in the statute of the International Tribunal for the Former Yugoslavia (art. 4),[795] the statute of the International Criminal Tribunal for Rwanda (art. 2)[796] and, in particular, the Rome Statute of the International Criminal Court, article 6 of which reproduces the definition contained in the Convention on the Prevention and Punishment of the Crime of Genocide. For its part, the Commission defined genocide in article 17 of the 1996 draft Code of Crimes against the Peace and Security of Mankind.[797] For the purposes of the present draft articles, the Commission has included in the annex both the Rome Statute (art. 6) and the Convention on the Prevention and Punishment of the

---

[794] Convention on the Prevention and Punishment of the Crime of Genocide (Paris, 9 December 1948), United Nations, *Treaty Series*, vol. 78, No. 1021, p. 277, art. II.

[795] Security Council resolution 827 (1993), annex.

[796] Security Council resolution 955 (1994), annex.

[797] *Yearbook ... 1996*, vol. II (Part Two), p. 44.

Crime of Genocide (art. II), given that the wording used in the two instruments is practically identical and has the same meaning.

(31) With regard to crimes against humanity, it should be recalled that some international treaties have identified certain behaviours as "crimes against humanity"[798] and that international courts have ruled on the customary nature of this category of crimes. The statute of the International Tribunal for the Former Yugoslavia (art. 5) and the statute of the International Criminal Tribunal for Rwanda (art. 3) have also defined this crime. The Commission itself defined this category of crimes in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 18).[799] However, the Rome Statute was the first instrument to define this category of crimes separately and comprehensively. For this reason, the Commission considered that article 7 of the Rome Statute should be taken as the definition of crimes against humanity for the purposes of the present draft article. This is consistent with the decision taken earlier by the Commission on the draft articles on crimes against humanity, draft article 3 of which reproduces the definition of this category of crimes contained in article 7 of the Rome Statute.[800]

(32) The concept of war crimes has a long tradition that was originally associated with treaties on international humanitarian law. The Geneva Conventions of 12 August 1949 for the protection of war victims and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), define that category of crimes as "grave breaches".[801] War crimes were defined in the statute of the International Tribunal for the Former Yugoslavia (arts. 2 and 3) and the statute of the International Criminal Tribunal for Rwanda (art. 4), as well as by the Commission itself in the 1996 draft Code of Crimes against the Peace and Security of Mankind (art. 20).[802] The latest definition of war crimes is contained in article 8, paragraph 2, of the Rome Statute, which draws on previous experience and refers comprehensively to war crimes committed in both international and internal armed conflicts, as well as to crimes recognized on the basis of treaties and customary law. For the purposes of the present draft article, the Commission decided to retain the definition contained in article 8, paragraph 2, of the Rome Statute, as the most up-to-date version of the definition of this category of crimes. This does not imply, however, that the importance of the Geneva Conventions of 1949 and the Additional Protocol thereto in relation to the definition of war crimes should be overlooked.

(33) The crime of *apartheid* was defined for the first time in the International Convention on the Suppression and Punishment of the Crime of *Apartheid* of 30 November 1973, which, although it describes *apartheid* as a crime against humanity and a crime under international law (art. I), contains a detailed and separate definition of the crime of *apartheid* (art. II). For this reason, the Commission decided to retain the definition in the 1973 Convention for the purposes of the present draft article.

(34) Torture is defined as a violation of human rights in all the relevant international instruments. Its characterization as prohibited conduct liable to criminal prosecution is

---

[798] International Convention on the Suppression and Punishment of the Crime of *Apartheid*, art. I; International Convention for the Protection of All Persons from Enforced Disappearance, preamble, fifth paragraph.

[799] *Yearbook … 1996*, vol. II (Part Two), p. 47.

[800] See *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), pp. 56-58, article 3 and paragraph (3) of the commentary thereto.

[801] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), art. 50; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), art. 51; Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 130; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 147 (United Nations, *Treaty Series*, vol. 75, Nos. 970-973); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (Geneva, 8 June 1977), art. 85 (*ibid.*, vol. 1125, No. 17512, p. 3).

[802] *Yearbook … 1996*, vol. II (Part Two), pp. 53-54.

found for the first time in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, which defines it as a separate crime in article 1, paragraph 1. This definition includes, moreover, the significant requirement that an act cannot be characterized as torture unless it is carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. A similar definition is contained in the Inter-American Convention to Prevent and Punish Torture (arts. 2 and 3).[803] The Commission considers that, for the purposes of the present draft article, torture is to be understood in accordance with the definition in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

(35) The enforced disappearance of persons was defined for the first time in the Inter-American Convention on Forced Disappearance of Persons, of 9 June 1994 (art. II).[804] The International Convention for the Protection of All Persons from Enforced Disappearance, of 20 December 2006, also defines this crime (art. 2). As in the case of torture, this definition requires that the act be carried out by or at the instigation of or with the consent of public officials, which places this crime squarely within the scope of the present draft articles. The Commission therefore considers that, for the purposes of the present draft article, the definition of enforced disappearance should be understood in accordance with article 2 of the 2006 Convention.

---

[803] Inter-American Convention to Prevent and Punish Torture (Cartagena, Colombia, 9 December 1985), Organization of American States, *Treaty Series*, No. 67.

[804] Inter-American Convention on Forced Disappearance of Persons (Belem, Brazil, 9 June 1994), Organization of American States, *Official Records* OEA/Ser.A/55.

Chapter VIII
Peremptory norms of general international law (*jus cogens*)

A. Introduction

142. At its sixty-seventh session (2015), the Commission decided to include the topic "*Jus cogens*" in its programme of work and appointed Mr. Dire D. Tladi as Special Rapporteur for the topic.[805] The General Assembly subsequently, in its resolution 70/236 of 23 December 2015, took note of the decision of the Commission to include the topic in its programme of work.

143. At its sixty-eighth session (2016), the Commission had before it the first report of the Special Rapporteur,[806] which addressed conceptual issues and raised a number of methodological questions, including whether the Commission should, as part of the consideration of the topic, provide an illustrative list of norms that qualify as *jus cogens*. The report further traced the historical and theoretical foundations of *jus cogens*.

B. Consideration of the topic at the present session

144. At the present session, the Commission had before it the second report of the Special Rapporteur (A/CN.4/706), which sought to set out the criteria for the identification of peremptory norms (*jus cogens*), taking the Vienna Convention on the Law of Treaties of 1969 (hereinafter the "1969 Vienna Convention") as a point of departure in developing the criteria. On the basis of his analysis, the Special Rapporteur proposed six draft conclusions.[807] The Special Rapporteur further proposed that the Commission change the name of the topic from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)".

145. The Commission considered the second report at its 3368th to 3370th, and 3372nd to 3374th meetings, from 3 to 5, and 11 to 13 July 2017.

146. At its 3374th meeting, on 13 July 2017, the Commission referred draft conclusions 4 to 9,[808] as contained in the Special Rapporteur's second report, to the Drafting Committee.

---

[805] At its 3257th meeting, on 27 May 2015 (*Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 286). The topic had been included in the long-term programme of work of the Commission during its sixty-sixth session (2014), on the basis of the proposal contained in the annex to the report of the Commission (*ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 23).

[806] A/CN.4/693.

[807] See the second report on *jus cogens* (A/CN.4/706): draft conclusion 4 (Criteria for *jus cogens*); draft conclusion 5 (*Jus cogens* norms as norms of general international law); draft conclusion 6 (Acceptance and recognition as a criterion for the identification of *jus cogens*); draft conclusion 7 (International community of States as a whole); draft conclusion 8 (Acceptance and recognition); and draft conclusion 9 (Evidence of acceptance and recognition).

[808] The text of draft conclusions 4 to 9, as proposed by the Special Rapporteur in his second report, reads as follows:

Draft conclusion 4
Criteria for *jus cogens*

To identify a norm as one of *jus cogens*, it is necessary to show that the norm in question meets two criteria:

(a) It must be a norm of general international law; and

(b) It must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.

Draft conclusion 5
***Jus cogens* norms as norms of general international law**

1. A norm of general international law is one which has a general scope of application.

At the same meeting, the Commission decided to change the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

147. At its 3382nd meeting, on 26 July 2017, the Chairperson of the Drafting Committee presented an interim report of the Drafting Committee on "Peremptory norms of general international law (*jus cogens*)", containing the draft conclusions that it had provisionally adopted at the sixty-ninth session. The report was presented for information only, and is available on the website of the Commission.[809]

---

2. Customary international law is the most common basis for the formation of *jus cogens* norms of international law.

3. General principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice can also serve as the basis for *jus cogens* norms of international law.

4. A treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm of general international law.

Draft conclusion 6
Acceptance and recognition as a criterion for the identification of *jus cogens*

1. A norm of general international law is identified as a *jus cogens* norm when it is accepted and recognized as a norm from which no derogation is permitted.

2. The requirement that a norm be accepted and recognized as one from which no derogation is permitted requires an assessment of the opinion of the international community of States as a whole.

Draft conclusion 7
International community of States as a whole

1. It is the acceptance and recognition of the community of States as a whole that is relevant in the identification of norms of *jus cogens*. Consequently, it is the attitude of States that is relevant.

2. While the attitudes of actors other than States may be relevant in assessing the acceptance and recognition of the international community of States as a whole, these cannot, in and of themselves, constitute acceptance and recognition by the international community of States as a whole. The attitudes of other actors may be relevant in providing context and assessing the attitudes of States.

3. Acceptance and recognition by a large majority of States is sufficient for the identification of a norm as a norm of *jus cogens*. Acceptance and recognition by all States is not required.

Draft conclusion 8
Acceptance and recognition

1. The requirement for acceptance and recognition as a criterion for *jus cogens* is distinct from acceptance as law for the purposes of identification of customary international law. It is similarly distinct from the requirement of recognition for the purposes of general principles of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.

2. The requirement for acceptance and recognition as a criterion for *jus cogens* means that evidence should be provided that, in addition to being accepted as law, the norm in question is accepted by States as one which cannot be derogated from.

Draft conclusion 9
Evidence of acceptance and recognition

1. Evidence of acceptance and recognition that a norm of general international law is a norm of *jus cogens* can be reflected in a variety of materials and can take various forms.

2. The following materials may provide evidence of acceptance and recognition that a norm of general international law has risen to the level of *jus cogens*: treaties, resolutions adopted by international organizations, public statements on behalf of States, official publications, governmental legal opinions, diplomatic correspondence and decisions of national courts.

3. Judgments and decisions of international courts and tribunals may also serve as evidence of acceptance and recognition for the purposes of identifying a norm as a *jus cogens* norm of international law.

4. Other materials, such as the work of the International Law Commission, the work of expert bodies and scholarly writings, may provide a secondary means of identifying norms of international law from which no derogation is permitted. Such materials may also assist in assessing the weight of the primary materials.

[809] http://legal.un.org/ilc.

1. Introduction by the Special Rapporteur of the second report

148. The Special Rapporteur indicated that his second report consisted of three substantive sections: section II on the previous consideration of the topic, section III on the criteria for *jus cogens* and section IV including proposals.

149. In section II on the previous consideration of the topic, the Special Rapporteur pointed out that the three States that had initially criticized the topic had maintained their criticism, while the vast majority of the States that had spoken on the topic had continued to express support.[810] He further underlined that there was general agreement on the need to change the name of the topic. He also recalled that, although the Commission had decided not to refer draft conclusion 2, as proposed in his first report, to the Drafting Committee, he intended to reintroduce the proposal in a future report. He also observed that the greatest division, both in the Commission and the Sixth Committee, concerned draft conclusion 3, in particular paragraph 2, which set forth three basic characteristics of norms of *jus cogens*, namely that such norms protect the fundamental values of the international community, are hierachically superior to other norms and are universally applicable.

150. The Special Rapporteur further recalled his intention to consider whether an illustrative list of *jus cogens* norms should be developed, underlining that he would make a firm proposal in that regard in a future report on miscellaneous issues and inviting members of the Commission to convey their views on the matter.

151. Section III of the report addressed the criteria for the identification of *jus cogens*, taking article 53 of the 1969 Vienna Convention as the basis for those criteria, consistent with the views expressed by States, as well as State practice, decisions of international courts and tribunals, scholarly writings, and the past consideration of *jus cogens* in terms of article 53 of the 1969 Vienna Convention by the Commission itself, while not limiting the scope of the topic to treaty law.

152. In that regard, the Special Rapporteur underlined that article 53 contained two cumulative criteria, namely that the norm in question must be a norm of general international law, and that it must be accepted and recognized as one from which no derogation is permitted. While the Special Rapporteur had identified several other ways to approach the definition, he was of the view that this two-criterion approach should be retained. It was thus captured in proposed draft conclusion 4, where paragraph (a) reproduced the first criterion and paragraph (b) reproduced the second.

153. The report then proceeded to assess the content of the first criterion, which was addressed in proposed draft conclusion 5 on "*Jus cogens* norms as norms of general international law". The Special Rapporteur indicated that he did not consider it necessary to have a specific draft conclusion detailing the relationship between customary international law and *jus cogens*. He noted that paragraph 2 of the proposed draft conclusion was sufficient in that regard. He further observed that the role of customary international law for the identification of *jus cogens* was fairly well settled, while the possibility of relying on other sources of international law was less so. He noted that authority could be found for the view that general principles of law could form the basis of *jus cogens*. That was evident, not only in practice, but also in the drafting history of article 50 of the articles on the law of treaties,[811] as well as in the fact that article 53 of the 1969 Vienna Convention clearly included general principles of law. In the light of the limited practice available, the Special Rapporteur had nonetheless deemed it desirable to include such general principles of law as a basis for *jus cogens*, albeit in less absolute terms than for customary international law.

154. Turning to treaties, the Special Rapporteur recalled that, while it was generally accepted that treaties did not, themselves, constitute a rule of general international law, a treaty rule could reflect a rule of general international law.

---

[810] See A/CN.4/706, paras. 10 and 12.

[811] The draft articles adopted by the Commission and the commentaries thereto are reproduced in *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, pp. 177 *et seq.*

155. The Special Rapporteur then observed that the second criterion, namely that the norm in question "must be accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted", addressed in draft conclusions 6 to 9, contained several elements: the first concerned the principal requirement of acceptance and recognition; the second was concerned with who or what was doing the recognizing and accepting; and the third concerned what was being accepted and recognized.

156. Considering that draft conclusion 6 set out the general context of the second criterion, the Special Rapporteur explained that the draft conclusion had a dual purpose: on the one hand, it stated that a determination that a norm was one of general international law was insufficient for its status as *jus cogens*, and, on the other hand, it laid down that what was relevant for the second criterion was the acceptance and recognition of the international community of States as a whole.

157. The Special Rapporteur noted that draft conclusion 7 concerned the issue of acceptance and recognition of the criterion, underlining that both the drafting history of article 53 of the 1969 Vienna Convention and the practice of States were of particular interest in that regard. He further stressed that, while the central role of the States, as a community, was emphasized in paragraph 2, the phrase "international community of States as a whole" was meant to indicate that it was the views of States, taken together, that ought to be considered, rather than their individual attitudes. Paragraph 2 of draft conclusion 7 also sought to capture the fine balance struck when the Commission had previously recognized the central role of States while not denying the potential influence that other entities might have in the identification of law.

158. Draft conclusion 8 addressed the content of the acceptance and recognition by the international community as a whole. The view of the Special Rapporteur was that, for a norm to qualify as *jus cogens*, it was insufficient to be only accepted and recognized as having a particular quality, namely that it is one that may not be derogated from (*opinio juris cogentis*); as was the case with customary international law, it was equally important to provide evidence of that acceptance and recognition.

159. The purpose of draft conclusion 9 was accordingly to address the nature of materials that might be offered as evidence. The Special Rapporteur recalled that, while for the most part, such materials were in practice similar to those often advanced as evidence of acceptance of law for customary international law, they were different in content.

160. Consistent with the debate in the Commission during its sixty-eighth session, the Special Rapporteur had proposed, in paragraph 90 of his report, that the name of the topic be changed from "*Jus cogens*" to "Peremptory norms of international law (*jus cogens*)". However, he subsequently noted that that his suggestion would not satisfy the requirement for consistency with article 53 of the 1969 Vienna Convention. He accordingly revised his proposal, so that the title of the topic be changed to "Peremptory norms of general international law (*jus cogens*)".

161. Regarding the future programme of work, the Special Rapporteur envisaged that, in 2018, the Commission would consider, potentially in two reports, the effects or consequences of *jus cogens*, in general terms, as well as in treaty law and other areas of international law. The fourth report, to be issued in 2019, would address any remaining miscellaneous issues, as well as proposals on an illustrative list of *jus cogens* norms.

2. Summary of the debate

(a) General comments

162. Overall, members welcomed the second report of the Special Rapporteur. The fact that the report maintained a balance between "flexibility of identification" and "the consensual nature of international law" was underlined. While most members emphasized the need to bring clarity to a difficult and complex concept, some recalled the scepticism surrounding the topic of *jus cogens* expressed by Member States.

163. While general agreement with the Special Rapporteur was expressed for taking article 53 of the 1969 Vienna Convention as the starting point for identifying the criteria of *jus cogens*, it was recalled that the concept of *jus cogens* may not cover all aspects to be considered by the Commission. It was pointed out that the topic was centuries older than the 1969 Vienna Convention, as the Special Rapporteur himself had confirmed in his first report. It was also pointed out that the Commission should critically reassess whether it wanted to base the criteria for the determination as to which norms have attained peremptory status in international law solely on article 53 of the 1969 Vienna Convention, as that would mean adopting a firmly consent-based understanding of *jus cogens*, while one of the purposes of *jus cogens* was precisely to set limits to what States could consent to or dispose of. It was also observed that *jus cogens* norms extended, beyond treaty law, to non-conventional instruments and other fields of law, such as the law on responsibility of States for internationally wrongful acts.

164. Agreement was expressed with the Special Rapporteur's proposition that customary international law is the most common basis for the formation of *jus cogens* norms, while divergent opinions were conveyed with the view of the Special Rapporteur that treaty rules should not as such be considered as a source or basis for *jus cogens* norms. It was also noted that a norm should have developed to a sufficient degree in all three sources of law, i.e., custom, treaties and general principles of law, for it to constitute a norm of *jus cogens*.

165. While most members agreed with the Special Rapporteur that the modification element referred to in article 53 of the 1969 Vienna Convention could not be a criterion, some expressed disagreement in that regard. The view was also expressed that the first sentence of article 53 ought to be inserted as a criterion.

166. Several members supported the Special Rapporteur's suggested criteria for the identification of *jus cogens*. Some members considered that the characteristics set out in paragraph 2 of draft conclusion 3 (fundamental values, hierarchical superiority and universal application) were obvious and basic elements, and called for them to be part of the identification criteria. It was stated that it was necessary to give the character of *jus cogens* as protecting fundamental values a place among the criteria for identification. In contrast, a view was expressed that such characteristics could be discussed in the commentary. The absence of concrete examples as to the formation and identification of *jus cogens* in the report was also noted. However, other members expressed satisfaction with the amount of identified practice to support the conclusions of the Special Rapporteur.

167. Many members shared the views of the Special Rapporteur on the significance of fundamental values, noting, for example, that *jus cogens* was "a way of upholding 'fundamental values of the international community'" and that those values were ones that could never be compromised; that *jus cogens* flows from the constitutional basis of the international community that has "basic and common values; that a *jus cogens* norm's peremptoriness derives from its acceptance as reflecting fundamental values"; or that the views of the Special Rapporteur were consistent with the position previously taken by the Commission, on its work on the law of treaties, State responsibility and fragmentation of international law.

168. Other members expressed the view that the meaning of "fundamental values" needed to be clarified, and that the concept had not yet been positively accepted by mainstream domestic and international courts and tribunals without opposing views. It was also observed that international law was grounded in a multiplicity of value systems and that there were, in principle, no uniform values in the international community. Some members called for a definition of fundamental values in international law and cautioned against the Special Rapporteur using the terms "protecting" and "reflecting" the fundamental values of international law interchangeably. In particular, the view was expressed that it was preferable to use both "protecting" and "reflecting" when referring to fundamental values.

169. Support was expressed for the inclusion of the link between fundamental values and *jus cogens* as the unique feature of *jus cogens* norms within international law.

170. Most members supported the Special Rapporteur's approach in relation to general international law as the first criterion. Some members questioned the absence of a

definition of the concept "general international law" in his report. The view was put forward that the reference to hierarchical superiority of *jus cogens* norms was more of a consequence than a characteristic of a norm of *jus cogens* and that the question of hierarchy raised important questions about the "effects of hierarchy" on sources of international law, such as general principles and customary international law. It was also observed that the first criterion was only a precondition for the existence of *jus cogens* and that, as such, it did not need to reflect all the characteristics of *jus cogens*.

171. Other members further recalled that there was no unanimity in doctrine on the concept. The view was also expressed that referring to the study on fragmentation of international law[812] was insufficient, as that study did not take a position on a definition of general international law. Furthermore, the question was raised as to whether norms of specialized regimes, including international humanitarian law rules, could be considered to form part of *jus cogens*.

172. As for the bases of *jus cogens*, several members agreed that customary international law was the most common basis. The view was expressed that international norms could include those emanating from treaties, as well as from other sources than those listed in Article 38, paragraph 1, of the Statute of the International Court of Justice, for example, resolutions of international organizations. Some concern was raised about the Special Rapporteur drawing distinctions between general international law and *lex specialis*, which was considered to potentially contribute to general international law.

173. Divergent views were expressed with regard to the role of general principles of law. While many members accepted that general principles could form the basis for *jus cogens*, others recalled the lack of common understanding of the general principles of law[813] that had led members of the Commission to set general principles of law aside at the time of the drafting of article 53 of the 1969 Vienna Convention, and noted that the Commission should accordingly refrain from referring to general principles in its consideration of *jus cogens*. Some members further questioned whether or not State practice supported the status of general principles of law as the basis for *jus cogens* and called for examples thereof. The view was also expressed that, while general principles of law could become a *jus cogens* norm, not all general principles of law had the status of *jus cogens*.

174. Among the reasons stated by some members in opposition to the inclusion of general principles of law was the fact that those principles were, by definition, domestic law principles. In that regard, it was observed that once such domestic law principles were recognized as general principles within the meaning of Article 38, paragraph 1 (c), of the Statute of the International Court of Justice, they ceased to be merely domestic law principles. It was further noted that general principles of law are a source of international law.

175. While some members considered that *jus cogens* norms existed independently of State will and determination, and were part of natural law, and encouraged the Special Rapporteur to develop further analyses of the nature of *jus cogens*, others expressed agreement with the approach of the Special Rapporteur in not engaging in the debate on the distinction between the "natural law" and "positive law" origin of the concept and supported the approach that it be addressed as reflected in State and judicial practice and academic literature.

176. While some members endorsed the two-step approach relied upon by the Special Rapporteur to prove the existence of a norm of general international law, i.e., a process by which a "normal" rule of customary international law would be elevated to a *jus cogens* norm under general international law and some others saw it as a useful analytical tool. Several members pointed out, however, that the formation of *jus cogens* had not to take

---

[812] "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (A/CN.4/L.682 and Corr.1 and Add.1), draft conclusions of the work of the study group, conclusion 20 "Application of custom and general principles of law".

[813] *Yearbook ... 1963*, vol. I, 684th meeting, para. 51.

these two steps in practice. It was stated that, in certain cases, the formation of *jus cogens* did not take two distinct steps, even if such steps were sometimes clearly distinguishable. The view was also expressed that other criteria should be taken into consideration; for example, that the norm in question should be one of general international law, that it should be non-derogable and that it could be modified only by a subsequent norm.

177. As to the second criterion, several members expressed disagreement with the view of the Special Rapporteur that non-derogability was not a criterion of identification of *jus cogens* but a consequence of its existence. They recalled that the concept of non-derogability determined which rules fell within the category of *jus cogens*, and that it was not merely a consequence, as per article 53 of the 1969 Vienna Convention. The view was also expressed that a norm consistently violated, *de facto*, by a significant number of States would not attain *jus cogens* status, even if those States claimed otherwise.

178. With regard to the jurisprudence of courts and tribunals, while it was stressed that the judicial practice of the International Court of Justice and other tribunals was appropriately documented by the Special Rapporteur, it was also noted that courts typically merely referred to *jus cogens* norms, without elaborating on what they meant by "general international law", "hierarchical superiority", "fundamental values", "acceptance and recognition" and "international community as a whole". The view was expressed that international courts seemed to have stripped the concept of *jus cogens* of its determining element, i.e., its hierarchical superiority over all other norms. Another view was that it was incorrect to assert that decisions of courts and tribunals were evidence of *jus cogens* as they existed as a subsidiary means for identifying norms of *jus cogens*.

179. Concern was expressed by several members in relation to the consideration of regional *jus cogens* and its universal applicability. Without a clear indication by the Special Rapporteur of his intention to study the possibility of non-universal *jus cogens*, it was suggested that no decision be taken at the present stage as to whether such norms were within the scope of the topic. The question was also raised as to whether "universal application" was meant to be understood as "all States" or "all subjects of international law". It was further opined that the assertion of universal application as reflected in draft conclusion 5, paragraph 1, was acceptable on the understanding that the question of the possibility of regional *jus cogens* would be addressed subsequently.

180. Recalling the Commission's previous attempts to develop an illustrative list of *jus cogens* norms, most members favoured the preparation of such a list in the context of the current study. Such list could provide an annex, listing "candidates" for *jus cogens*. Conversely, the view was expressed that it would not be a wise idea for the Commission to undertake the task of providing an illustrative list as it would take a disproportionately large amount of time to prepare. Instead, it was suggested that the Commission should agree on the methodology for the identification of *jus cogens* and the consequences.

(b) Specific comments on the draft conclusions

(i) General comments on the structure of the draft conclusions

181. Various proposals to combine and streamline the draft conclusions proposed in the Special Rapporteur's second report were made, with a view to the proposals being taken up by the Drafting Committee.

(ii) Draft conclusion 4

182. While support was expressed for draft conclusion 4, the exclusion of fundamental values from the normative criteria for *jus cogens* was questioned, given their essential character. It was thus suggested that the concept be incorporated as a normative criterion, retaining the wording used in the commentaries to the articles on responsibility of States for internationally wrongful acts,[814] i.e., "vital interests of the international community" and

---

[814] *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 76-77. See also General Assembly resolution 56/83 of 12 December 2001, annex.

"fundamental character" of peremptory norms, thus avoiding the term "fundamental values". It was also suggested that a link be established between draft conclusion 4 and the description of the elements in draft conclusions 5 to 8. It was further suggested that draft conclusion 4 should reflect the fact that the formation of *jus cogens* might not follow the suggested sequence reflected, either by adjusting the wording or by introducing an explanation in the commentaries. Noting that such an approach might result in a duplication of draft conclusion 3, paragraph 1, and might therefore not be really needed, another member suggested including the third criterion included in article 53 of the 1969 Vienna Convention in draft conclusion 4, either as subparagraph (c) or as part of subparagraph (b). It was also proposed, on the one hand, that the norm in question should be one of general international law, and, on the other hand, that four criteria should be taken into account, namely norms of general international law, acceptance and recognition by the international community, non-derogability and modification only by a subsequent norm. It was suggested that the last two criteria could be merged into one.

(iii) Draft conclusion 5

183. The view was expressed that the title of draft conclusion 5 could read "Source of general international law". While some members considered that draft conclusion 5 required substantiation and justification, others stressed that all three sources of law, i.e., custom, treaties and general principles of law, were equally important and should be treated equally. It was further suggested that paragraph 1 should clearly state that the relevant norms were binding upon all States, while doubt was expressed in relation to paragraph 5, considering that general principles of law were not, by nature, peremptory.

(iv) Draft conclusion 6

184. In terms of another view, draft conclusion 6 could be deleted as it was essentially reiterating that there had to be acceptance and recognition by the international community as a whole.

(v) Draft conclusion 7

185. The use of the term "attitude" in draft conclusion 7, paragraph 1, was questioned. While support was conveyed for the approach taken in paragraph 3, another view was expressed that such an approach was unbalanced, as it required only a mild standard of agreement by States. A formula requiring the consent of virtually all, or most, States for *jus cogens* norms, such as "very large majority", or "substantially all States" was favoured by several members. In another view, it was suggested that paragraphs 1 and 2 of draft conclusion 7 be combined, or paragraph 2 be deleted, as *jus cogens* norms were universally applicable.

(vi) Draft conclusion 8

186. With a view to making draft conclusion 8 comprehensive, it was suggested that the phrase, in paragraph 2, "the norm in question is accepted by States" be replaced by "the norm in question is accepted and recognized by the international community of States as a whole". The Special Rapporteur was also invited to consider the issue of acquiescence as a form of acceptance and recognition and to address the fact that draft conclusion 8, paragraph 2, did not shed light on the subject matter, as it repeated what was reflected in draft conclusions 3, 4 and 6.

(vii) Draft conclusion 9

187. The view was expressed that materials qualitatively different from those constituting evidence of customary international law were required to prove the elevation of such norms to the status of *jus cogens* norms in order to avoid "double or triple counting". Another view was put forward that national constitutions be included as evidence and that language be inserted to make it clear that the list in paragraph 2 was not exhaustive. It was also

suggested that the fourth requirement identified by the International Court of Justice,[815] i.e., the regular denunciation of a behaviour within international and national forums be included as a means of evidence. It was also proposed that it should be clarified, on the one hand, whether there was a qualitative difference between the materials listed and, on the other hand, that, in paragraph 2, resolutions should be adopted by States parties to the organizations to which reference was made, and that the word "unanimous" be added. Another view was to include a reference to the modification of *jus cogens*. It was further suggested that paragraph 2 be amended to read: "The following materials may provide evidence of the opinion of the international community of States as a whole with regard to the acceptance of recognition …"; paragraph 3 should be improved by saying that decision of courts and tribunals "may serve as a subsidiary means for identifying a norm as *jus cogens*".

(viii) *Title of the topic*

188. Support was expressed for changing the title of the topic. Suggestions included: "Peremptory norms (*jus cogens*)", "Peremptory norms of general international law (*jus cogens*)", "*Jus cogens* in the law of treaties", "*Jus cogens* in international law" and "*Jus cogens* in general international law".

(ix) *Future work*

189. While support was generally expressed for the Special Rapporteur's indication of the planned future work on the topic, it was suggested that the issues relating to State responsibility be addressed not only in the context of "effects" but also from the perspective of the whole categorization of *jus cogens*, including definition, criteria and content, as well as its consequences. The need to develop an integrated concept of *jus cogens* that covered both treaty law and State responsibility was also underlined.

3. Concluding remarks of the Special Rapporteur

190. The Special Rapporteur gave an overview of the comments and observations made during the debate. He further reiterated his preference that the draft conclusions remain in the Drafting Committee until a complete set had been adopted.

191. The Special Rapporteur commented on various issues raised during the debate, including: the suggestion that the Commission ought to deal with domestic *jus cogens* — an issue which, in his view, should not be considered, because: the Commission had decided to use article 53 of the 1969 Vienna Convention on the Law of Treaties as the basis for its work; because of the need to consider practice from a broader regional spread, which led him to invite members to send him materials at their disposal; because of the need to diversify the sources of evidence; and because of the suggestion that he refer to the practice and traditions of various cultural groups.

192. As regarded the linkage between universal applicability and regional *jus cogens*, the Special Rapporteur reiterated his view that regional *jus cogens* was not possible in legal terms, for reasons he would address in a future report. For the time being, he was of the view that a possible outcome of that study could be a draft conclusion stating either that regional *jus cogens* norms were possible as an exception to the general rule; regional *jus cogens* norms were not possible under international law; simply indicating that the draft conclusions were "without prejudice" to the possibility of the existence of regional *jus cogens*; or having no provision at all. He further suggested addressing the question as to whether the reference to universal application meant "all States" or "all subjects of international law", in a future report.

193. On the issue of hierarchical superiority as seen through the jurisprudence of international courts and tribunals, the Special Rapporteur expressed the view that courts, especially the International Court of Justice, sought to specifically exclude the hierarchy

---

[815] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 422, at p. 457, para. 99.

question by stating that the rules in question were not in a relationship of conflict, so that the issue of hierarchy did not arise at all. He also confirmed that he did not share the view that hierarchical superiority was more of a consequence than a characteristic.

194. The Special Rapporteur disagreed with the views expressed in relation to draft conclusion 3, paragraph 2, which had been referred to the Drafting Committee in 2016, that the provision seemed to suggest that characteristics of *jus cogens* should not be included unless they had a direct effect on the criteria and identification of *jus cogens*. He indicated that the draft conclusions were, by their nature, a mixture of normative and descriptive conclusions on the state of the law. He noted that he intended to explain in the commentary that such characteristics may be relevant in assessing the criteria for *jus cogens* norms of international law.

195. In relation to the view expressed by some members that article 53 of the 1969 Vienna Convention ought not to serve as the sole basis for the consideration of the topic, he recalled that the approach he had taken in his two reports, including on the criteria for *jus cogens*, was not one based entirely on consent. In his view, while the role of States was central to the topic, that did not mean that it was based entirely on the existence of consent.

196. The Special Rapporteur recalled that most members had agreed with the two-step approach, although some members had raised questions about it. He recalled that the two-step approach was not to be equated with double or triple counting: the first step was one of searching for the existence of law, most often customary international law. In the second step, the status of the rule or norm in question as law was not at issue. What was at issue was its peremptory character.

197. The Special Rapporteur did not agree with arguments advanced in favour of including modification as a criterion, recalling that judicial practice from both domestic and international courts had focused on the evidence of acceptance and recognition of non-derogability. He nonetheless accepted the suggestion, on the understanding that the derogation and modification elements would not be viewed as separate criteria, but rather as a composite part of the criterion.

198. He recalled that most members, if not all, had expressed agreement with the proposed change of the title of the topic from "*Jus cogens*" to "Peremptory norms of general international law (*jus cogens*)".

199. With regard to the various drafting suggestions made by members to the effect of streamlining the draft conclusions, he stressed that the purposes served by different provisions ought to be taken into account, and indicated that he was receptive to restructuring the draft conclusions in line with suggestions made during the debate in plenary.

200. The Special Rapporteur noted that, while most members expressed agreement with the general orientation of his approach to the first criterion, i.e., the concept of general international law, a number of issues had been raised on particular aspects, including as to whether international humanitarian law rules could not form part of *jus cogens*. In that connection, he confirmed that general international law was not to be distinguished from *lex specialis* and that, accordingly, international humanitarian law was not excluded from the possibility of producing *jus cogens* norms.

201. Commenting on the suggestion that norms of general international law were those that were binding on all States, he observed that the first criterion was only a precondition for the existence of *jus cogens* and that, as such, it did not need to reflect all the characteristics of *jus cogens*.

202. The Special Rapporteur then addressed the disagreement expressed by some members with the report's conclusion that treaties could not be part of general international law; he considered that the Commission should be cautious before concluding that treaties as such could be part of general international law, in particular because draft conclusion 5 did not categorically close the door on the arguments made by members. He further stated that the draft conclusion did not concern evidence. Instead, it was intended to provide some conclusions about sources of international law and their relationship to *jus cogens*, and underlined that resolutions and other materials did not qualify as such sources.

203. Turning to the suggestion that all three sources, customary international law, general principles of law and treaty law, ought to play an equal role with regard to the identification of *jus cogens* and that all three should exist at the same time for there to be a *jus cogens* norm, he underlined that the proposals did not correspond to practice and doctrine.

204. The Special Rapporteur further commented on observations made in connection to general principles of law, underlining that, for the purposes of *jus cogens*, it was sufficient only to note the possibility that general principles could form the basis of norms of *jus cogens*, and that it would not be appropriate to exclude that possibility. He also recalled that proposed draft conclusion 5 was sufficiently soft, so as to connote that this was only a possibility and that the practice in that regard was minimal. The commentary, if the text were adopted, would also make that clear.

205. Commenting on draft conclusion 6, the Special Rapporteur noted that it had not been the subject of criticism, although several members had suggested that it could be integrated into other provisions, an approach he did not favour, as the draft conclusion served to introduce the second criterion. While the Special Rapporteur was not in favour of deleting it either, he would, in the event the Drafting Committee decided to do so, provide the structural orientation of the draft conclusions concerned with the identification of *jus cogens* in the commentary.

206. Issues that were raised in the context of draft conclusion 7 concerned the meaning of the phrase "as a whole". In that regard, the Special Rapporteur noted that, as some members, he was of the view that it sought to inspire a sense of the collective. He also underlined that he did not agree with the views that the word "attitude" was inappropriate, or with the suggestion that practice, coupled with *opinio juris*, was required. He strongly supported, however, the proposal to retain the word "conviction" and was amenable to retaining the term "very", which had been dropped from paragraph 3, although the phrase "a large majority" was not intended to signify a less than substantial majority.

207. With regard to draft conclusion 8, the Special Rapporteur invited the Drafting Committee to replace the phrase "accepted by States as one which cannot be derogated from" with "accepted and recognized by the international community of States as a whole as one from which no derogation is permitted". He disagreed with the comment that draft conclusion 8, paragraph 2, did not add much to the subject.

208. The Special Rapporteur further indicated that he agreed with the drafting suggestions made in relation to draft conclusion 9. He considered that national constitutions should be included as possible evidence, and that the Drafting Committee might consider inserting national legislation into paragraph 2.

209. While refraining from commenting on observations made in relation to the illustrative list of issues, the Special Rapporteur noted that the decision he would recommend would be based on the substance of the arguments made.

210. The Special Rapporteur reiterated his preference that the Drafting Committee finalize its work on all the proposals for draft conclusions that he intended to make during the first reading before transmitting them back to the plenary.

Chapter IX
Succession of States in respect of State responsibility

A. Introduction

211. At its sixty-ninth session (2017), the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[816]

B. Consideration of the topic at the present session

212. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/708), which sought to set out the Special Rapporteur's approach to the scope and outcome of the topic, and to provide an overview of general provisions relating to the topic.

213. The Commission considered the first report at its 3374th to 3381st meetings, from 13 to 25 July 2017, respectively.

214. At its 3381st meeting, on 25 July 2017, the Commission decided to refer draft articles 1 to 4, as contained in the Special Rapporteur's first report, to the Drafting Committee, taking into account the views expressed in the plenary debate and on the understanding that draft articles 3 and 4 would be left pending in the Drafting Committee.

215. At its 3383rd meeting, on 31 July 2017, the Chairman of the Drafting Committee presented an interim oral report on draft articles 1 and 2, provisionally adopted by the Drafting Committee. The report was presented for information only and is available on the website of the Commission.[817]

1. Introduction by the Special Rapporteur of the first report

216. The Special Rapporteur indicated that his first report focused on general provisions that would underpin the future examination of the topic. The report first provided an overview of views received from delegations during the debate of the Sixth Committee at the seventy-first session of the General Assembly, in 2016, in which several delegations had expressed support for the inclusion of the topic in the Commission's long-term programme of work, with a particular focus on its potential to fill gaps within international law. A few delegations had questioned the contemporary relevance of the topic, and had expressed some doubt as to the possibility of States to find consensus on the controversial topic.

217. Regarding the scope and outcome of the topic, a question inextricably linked to the previous work of the Commission, the Special Rapporteur reiterated that the topic dealt with two areas of international law that were already the object of codification and progressive development by the Commission: namely, succession of States and State responsibility. The Special Rapporteur drew attention to the previous work of the Commission that had left gaps for examination at a later point,[818] as well as the work

---

[816] At its 3354th meeting, on 9 May 2017. The topic had been included in the long-term programme of work of the Commission during its sixty-eighth session (2016), on the basis of the proposal contained in annex B to the report of the Commission (*Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10)).

[817] http://legal.un.org/ilc.

[818] With respect to international responsibility, this includes the 2001 draft articles on responsibility of States for internationally wrongful acts, *Yearbook … 2001*, vol. II (Part Two) and corrigendum, paras. 76-77 (see also General Assembly resolution 56/83 of 12 December 2001, annex); and the 2011 draft articles on the responsibility of international organizations, *Yearbook … 2011*, vol. II (Part Two), paras. 87-88 (see also General Assembly resolution 66/100 of 9 December 2011, annex). With respect to succession of States, this includes the Vienna Convention on Succession of States in Respect of Treaties (Vienna, 23 August 1978), United Nations, *Treaty Series*, vol. 1946, No. 33356, p. 3; the

concluded on the topic by the Institute of International Law.[819] The Special Rapporteur emphasized that the aim of examining the topic was to shed more light on the question of whether there were rules of international law governing both the transfer of obligations and the transfer of rights arising from the international responsibility of States for internationally wrongful acts in situations of succession of States. With a focus on the secondary rules of international responsibility, the scope of the topic would not extend to any issues of international liability for injurious consequences arising out of acts not prohibited by international law. The Special Rapporteur indicated that the work on the topic should also follow the main principles of succession of States concerning the differentiation of transfer of a part of a territory, secession, dissolution, unification and creation of a new independent State.

218. Noting the relevant precedents of the articles on responsibility of States for internationally wrongful acts and those articles that became the Vienna Convention on succession of States in respect of treaties (hereinafter "1978 Vienna Convention") and Vienna Convention on Succession of States in respect of State Property, Archives and Debts (hereinafter "1983 Vienna Convention"), as well as the articles on nationality of natural persons in relation to the succession of States, the Special Rapporteur indicated that the appropriate form for the topic appeared to be draft articles with commentaries thereto.

219. Concerning the general provisions that would form the foundation for further examination of the topic, the Special Rapporteur noted that, historically, the doctrine of State succession had generally denied the possibility of the transfer of responsibility to a successor State — the theory of non-succession.

220. While acknowledging that the body of scholarship and theory had supported that position, the Special Rapporteur highlighted that some scholars had questioned the existence of a general rule on State succession applicable in all circumstances. The Special Rapporteur introduced a preliminary survey of State practice in the report, including some judicial decisions, relating to international responsibility in different cases of State succession. He underlined his provisional conclusion that modern international law did not support the general thesis of non-succession in respect of State responsibility. The Special Rapporteur also examined the relevance to the present topic of the two Vienna Conventions on succession. The Special Rapporteur emphasized that, in order to ensure a systemic integration approach, it would be important to utilize the same terms and definitions in a uniform manner for succession in respect of treaties, State property, debts and archives, nationality of natural persons, and State responsibility.

221. The Special Rapporteur noted that there was no universal regime concerning succession of States, but rather several areas of legal relations to which succession of States applies. Therefore, rules on succession of States in one area, e.g. in respect of treaties, may differ from the rules in another area, e.g. in respect of State property, debts and archives. He underlined that different areas of succession were independent and governed by special rules.

222. The Special Rapporteur also drew the Commission's attention to the complicated question of whether obligations arising from wrongful acts are "debts" subject to the 1983 Vienna Convention or are otherwise to be examined under the current topic. The Special Rapporteur drew attention to his preliminary conclusion that it would be a debt for the purposes of rules on succession in respect of State debts, if such an interest in assets of a fixed or determinable value was acknowledged by the State or so adjudicated by an

---

Vienna Convention on Succession of States in Respect of State Property, Archives and Debts (Vienna, 8 April 1983), not yet in force, United Nations, *Juridical Yearbook 1983* (United Nations publication, Sales No. E.90.V.1), p. 139; the 1999 draft articles on nationality of natural persons in relation to the succession of States, *Yearbook ... 1999*, vol. II (Part Two), paras. 47-48 (see also General Assembly resolution 55/153 of 12 December 2000). Issues of succession also appear in the context of the Commission's work on the draft articles diplomatic protection, *Yearbook ... 2006*, vol. II (Part Two), paras. 49-50 (see also General Assembly resolution 62/67 of 6 December 2007, annex).

[819] See Institute of International Law, resolution on succession of States in matters of international responsibility, 28 August 2015.

international court or arbitral tribunal at the date of succession. However, if an internationally wrongful act occurred before the date of the succession, but the legal consequences arising therefrom had not already been specified (e.g. a specific amount of compensation was not awarded by an arbitral tribunal), then any possible transfer of obligations or rights should be governed by rules on succession of States in respect of State responsibility.

223. According to the Special Rapporteur, from his analysis, there appeared to be support for two preliminary conclusions, namely that the traditional thesis of non-succession had been questioned in modern practice; and, that the transfer or not of obligations or rights arising from State responsibility in specific kinds of succession needed to be proved on a case-by-case basis. Drawing on the Commission's experience with respect to its work on succession of States, as well as the rarity and highly political nature of the subject matter, the Special Rapporteur highlighted that the rules to be codified should be of a subsidiary nature. As such, they could serve two purposes. First, they could present a useful model that could be used and also modified by the States concerned. Second, in cases of lack of agreement, they could present a default rule to be applied in case of dispute.

224. Noting that, in principle, an agreement between the States concerned should have priority over subsidiary general rules on succession to be proposed in the work under the present topic, the Special Rapporteur elaborated on the analysis in his report of the relevance of such agreements, in view of the *pacta tertiis* rule set out in articles 34 and 36 of the Vienna Convention on the Law of Treaties. Classifying the relevant agreements into the categories of devolution agreements, claims agreements and other agreements, the Special Rapporteur drew on an examination of a variety of relevant agreements between predecessor and successor States to suggest that a nuanced approach be taken, with a focus on the content of and the parties to such agreements, to determine the applicable rule.

225. The Special Rapporteur also addressed the question of the relevance of unilateral acts in the context of the present topic. He highlighted the work in his report, which had first analysed certain examples of unilateral acts and then the relevant rules on State responsibility and unilateral acts of States adopted thus far by the Commission. The Special Rapporteur highlighted that, after examination of those examples, a distinct approach to the question of unilateral acts in the context of international responsibility, as opposed to the strict approach adopted by under the 1978 Vienna Convention, should be proposed.

226. The Special Rapporteur proposed four draft articles. The first dealt with the scope of the entire set of draft articles;[820] the second presented a series of definitions of specific terms, drawing on the definitions included in the two Vienna Conventions on succession and the draft articles on responsibility of States for internationally wrongful acts;[821] the

---

[820] The text of draft article 1 proposed by the Special Rapporteur in his first report reads as follows:

Draft article 1

Scope

The present draft articles apply to the effect of a succession of States in respect of responsibility of States for internationally wrongful acts.

[821] The text of draft article 2 proposed by the Special Rapporteur in his first report reads as follows:

Draft article 2

Use of terms

For the purposes of the present draft articles:

(a) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(b) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(c) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(d) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of territory to which the succession of States relates;

third set out a framework to analyse the relevance of the agreements to succession of States in respect of responsibility,[822] and the fourth provided for a framework with respect to unilateral declarations made by a successor State.[823]

227. As regarded the future work programme, the Special Rapporteur envisaged that the Commission would consider: the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State, in 2018; the transfer of the rights or claims of an injured predecessor State to the successor State, in 2019; and any remaining procedural and miscellaneous issues, including the plurality of successor States, or a possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals, in 2020. The Special Rapporteur indicated that, depending on the progress of the debate, the entire set of draft articles could be adopted on first reading in 2020 or 2021.

2. Summary of the debate

(a) General comments

228. Members welcomed the first report of the Special Rapporteur, and supported the need for harmony between the present topic and the previous work of the Commission on related topics of responsibility and succession. A number of members underlined that the present topic would fill gaps previously left by the Commission during the examination of

---

(e) "international responsibility" means the relations which arise under international law from the internationally wrongful act of a State;

[…]

[822] The text of draft article 3 proposed by the Special Rapporteur in his first report reads as follows:

Draft article 3

Relevance of the agreements to succession of States in respect of responsibility

1. The obligations of a predecessor State arising from an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations shall devolve upon the successor State.

2. The rights of a predecessor State arising from an international wrongful act owed to it by another State before the date of succession of States do not become the rights of the successor States towards the responsible State only by reason of the fact that the predecessor State and the successor State have concluded an agreement providing that such rights shall devolve upon the successor State.

3. An agreement other than a devolution agreement produces full effects on the transfer of obligations or rights arising from State responsibility. Any agreement is binding upon the parties to it and must be performed by them in good faith.

4. The preceding paragraphs are without prejudice to the applicable rules of the law of treaties, in particular the *pacta tertiis* rule, as reflected in articles 34 to 36 of the Vienna Convention on the Law of Treaties.

[823] The text of draft article 4 proposed by the Special Rapporteur in his first report reads as follows:

Draft article 4

Unilateral declaration by a successor State

1. The rights of a predecessor State arising from an internationally wrongful act committed against it by another State or another subject of international law before the date of succession of States do not become the rights of the successor State by reason only of the fact that the successor State has made a unilateral declaration providing for its assumption of all rights and obligations of the predecessor State.

2. The obligations of a predecessor State in respect of an internationally wrongful act committed by it against another State or another subject of international law before the date of succession of States do not become the obligations of the successor State towards the injured State or subject only by reason of the fact that the successor State has accepted that such obligations shall devolve upon it, unless its unilateral declaration is stated in clear and specific terms.

3. Any unilateral declarations by a successor State and their effects are governed by rules of international law applicable to unilateral acts of States.

those related topics, although the view was also expressed that the first report of the Special Rapporteur had provided insufficient examination of the relationship of the present topic with the Commission's articles on State responsibility of States for internationally wrongful acts. Some concern was expressed regarding the speed and manner of the selection of the topic to be included on the Commission's agenda at the start of a new quinquennium, which might have resulted in a lack of discussion over the purpose and outcome of the topic; some members encouraged the Commission to examine how it selected topics on which to work.

229. While some members suggested that the topic was a highly relevant one, which it was right to take up at the current time and with support and practice from States now present, other members questioned its current significance. The rarity of succession, as well as the different political and historical contexts in which they occurred, was raised as an obstacle to identifying any unified or clear trend in practice. Some members raised the concern that a very limited number of States had shown interest in the topic in the Sixth Committee. Several members supported the Commission's consideration of the work of private bodies on the topic, including the Institute of International Law[824] and the International Law Association,[825] but underlined that the Commission should proceed independently in its examination of the topic. The need for the Special Rapporteur to provide the Commission with a more systematic account of the relevant materials, especially with respect to State practice and case law, as well as the direction and purpose of the topic, was pointed out.

230. Regarding the general rule on succession of States in respect of State responsibility, several members emphasized that it would be necessary to examine the general substantive rules relating to succession of States relating to State responsibility before examining potential exceptions or saving clauses that had been set out in draft articles 3 and 4; however, it was also stated that those established ways to transfer responsibility were not dependent on the general rule.

231. A number of members underlined that the "traditional" rule of non-succession that the Special Rapporteur had outlined remained the prevailing position at the present time, with the possibility of automatic succession being limited to succession in State debts, and the potential for a limited range of clearly established possible exceptions to non-succession being available. Other members expressed doubt that the traditional rule of non-succession had changed, although the report of the Special Rapporteur suggested he saw it otherwise, and suggested that any shift from the traditional rule must be supported by clear and unambiguous evidence of State practice and decisions of courts and tribunals.

232. Several members also highlighted that the examples of State practice and jurisprudence, both national and international, that the Special Rapporteur had cited to support his position for evolution in the traditional rule did not in fact support that finding, while other members suggested that, at a minimum, the jurisprudence presented by the Special Rapporteur did suggest that any general rule was not absolute. It was also stated that the doctrine presented by the Special Rapporteur did not support an evolving trend either. In particular, the judgment of the International Court of Justice in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*[826] case had been limited to the explicit agreement of succession of responsibility between Hungary and Slovakia, and the Court had not given any indication to the wider question of succession in State responsibility. In turn, the Court had not taken a position either way in the *Genocide* case between Croatia and Serbia[827] on the question of succession regarding State responsibility. It was underlined that agreements between States or unilateral declarations on matters of succession could not depend on a sense of obligation arising from general international law and might support the traditional rule as opposed to any new trend. Alternatively, it was also suggested that the "trend"

---

[824] See footnote 819 above.

[825] International Law Association, *Report of the Seventy-third Conference, Rio de Janeiro, 17-21 August 2008* (London, 2008), pp. 250 *et seq.*

[826] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7.

[827] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Merits, Judgment of 3 February 2015.

identified by the Special Rapporteur of moving away from the traditional rule of non-succession could be limited to specific forms of succession, and therefore how the Commission analysed those situations would affect the final outcome.

233. In examining the question of a general rule on succession, some members emphasized a desire for greater attention to State practice, as well as to practice from all regions. Concern was expressed that there was a lack of clarity as to the extent that examination of the topic was to be an exercise of codification or of progressive development. Some members stated that given the prevailing traditional default position of non-succession, examination of the topic would necessarily be an exercise of progressive development and that, given the Commission's history on topics relating to succession, wide acceptance by States of a final set of articles on the topic would be difficult to achieve.

234. Support was expressed by several members for the Special Rapporteur's indication in his first report that he would focus on differing forms of succession in examining the topic. Some members underscored that a necessary component of examining differing forms of succession was a clear and detailed explanation of the factual differences in such circumstances.

(b) Specific comments

(i) Draft article 1 — Scope

235. The suggestion was made by several members to amend the scope as proposed by the Special Rapporteur to include "in respect of rights and obligations arising out of an internationally wrongful act", thereby ensuring greater clarity and focus in the scope of the topic, as opposed to a general focus on State responsibility. While some members suggested that the topic required examination of primary rules of obligation, other members supported that the topic focus exclusively on general secondary rules of responsibility. While a number of members agreed with the Special Rapporteur on excluding questions concerning responsibility to international organizations from the topic, other members suggested that the Special Rapporteur examine the rights of international organizations as an injured party in his future work. Members expressed opposing viewpoints over the decision to exclude "liability" from examination, and issues concerning the terms "responsibility" and "liability" in certain languages were raised by some members.

236. Several members opposed a suggestion to request the Special Rapporteur to include an examination of the succession of governments in his work, while some members supported the suggestion to also include examination of whether or not the succession itself had been lawful or unlawful under international law.

(ii) Draft article 2 — Use of terms

237. A number of members supported the elaboration of the use of terms set out in subparagraphs (a)-(d) of draft article 2, with members concurring with the Special Rapporteur's utilization of previous work of the Commission. Some concern that the use of the word "replaced" in sub-paragraphs (b)-(d) could be misleading was raised, given the instances of succession where the predecessor State did not cease to exist or had not been replaced entirely. Additionally, a concern was raised over subparagraph (a), given that the definition did not refer to the additional test of "legality" found in the 1978 Vienna Convention, and thus it was suggested that its final form for the topic remain open for discussion.

238. With respect to subparagraph (e) on defining "international responsibility", the view was expressed that a definition of the term "internationally wrongful act" would be necessary, while several members felt the entire subparagraph was unnecessary to the examination of the topic and should be deleted. It was also suggested that the words "consequences", "legal consequences" or "covers international relations", in terms of the rights and obligations arising from internationally wrongful acts, would be more appropriate than "relations" in subparagraph (e).

239. A number of members made suggestions of additional terms that should be provided definitions in this draft article, including "devolution agreement", "unilateral declaration", "another subject of international law", "compensation agreement", and further definitions of the types of succession that the Special Rapporteur had indicated he would examine across the topic.

(iii) *Draft article 3 — Relevance of the agreements to succession of States in respect of responsibility*

240. Several members raised the possibility of deleting or simplifying paragraphs 3 and 4, as they might be redundant, merely restating that those agreements were subject to treaty law principles, and the content could be addressed in the commentary. It was suggested that the "non-prejudice" clause of paragraph 4 relating to the *pacta tertiis* rule made the distinctions in the forms of agreement set out in paragraphs 1 to 3 redundant. Some members sought greater specification as to the meaning of "an agreement other than" in paragraph 3.

241. Further suggestions from members to the Special Rapporteur included considering developments in the *pacta tertiis* rule in terms of devolution agreements, and the need to delve deeper the different forms of succession before examining agreements.

(iv) *Draft article 4 — Unilateral declaration by a successor State*

242. Some members noted that the phrase "stated in clear and specific terms" included in the Special Rapporteur's proposed draft article 4, paragraph 2, did not include all of the criteria for a unilateral act to be binding that had been included in the Commission's previous work on unilateral declarations,[828] and suggested that draft article 4 be amended to include a general reference to all these requirements. The need for the Special Rapporteur to focus on further situations of the assumption of responsibility by a State, outside the confines of unilateral declarations, was emphasized. Finally, it was suggested that the order of the elements of draft article 3 should be reproduced in draft article 4 for consistency.

243. While some members supported sending all four draft articles to the Drafting Committee, other members supported the sending of only draft articles 1 and 2, suggesting that articles 3 and 4 be held back for further discussion or at least kept within the Drafting Committee until further reports of the Special Rapporteur had been examined. The view was also expressed that further discussion on all draft articles should occur before they were sent to the Drafting Committee.

(c) Final form

244. In terms of the final form that the project should take, support was expressed for draft articles, as proposed by the Special Rapporteur, given the Commission's use of articles in its previous work on issues of succession. Some members suggested that decision on the final form should occur at a later stage, and indicated the potential advantages of draft guidelines. Members supported the Special Rapporteur's emphasis on any final product being subsidiary in character to agreements between States.

(d) Future programme of work

245. A number of members expressed their support for the future programme of work suggested by the Special Rapporteur, while several members suggested that the Special Rapporteur focus his next report on the general rules applicable to all situations of State succession in respect of State responsibility. A suggestion was also made that the Special Rapporteur should address the procedure of determination of claims in succession before

---

[828] Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, General Assembly resolution 61/34 of 4 December 2006. The guiding principles adopted by the Commission and the commentaries thereto are reproduced in the *Yearbook ... 2006*, vol. II (Part Two), paras. 176-177.

turning to the transfer of claims, and highlighted the need to focus on the rights or claims of the successor State.

3. Concluding remarks of the Special Rapporteur

246. In response to the debate, the Special Rapporteur indicated that the topic would include both the progressive development and codification of international law, while he acknowledged that State practice and case law were not equally developed in various areas and types of the succession of States.

247. Concerning the State practice and case law cited in his first report, the Special Rapporteur agreed that more in-depth research of State practice would be needed and would be included in future reports, and greater attention would be given to cases from regions outside of Europe. The Special Rapporteur acknowledged that State practice was not clear and that cases on such matters could be interpreted in different ways. He emphasized his strong disagreement only with what he called the old doctrine or fiction of the highly personal nature of State responsibility that appeared to exclude, *a priori*, any possible transfer of rights and obligations arising from internationally wrongful acts. The Special Rapporteur underlined that new developments should be also analysed and reflected.

248. With respect to aspects of the scope of the topic, the Special Rapporteur confirmed his preference for leaving out questions on succession of States in respect of consequences of lawful acts at the present stage of the work, with a study potentially to be included at a later stage. He affirmed that, while he would put aside succession in respect of responsibility to international organizations as such, future work on the topic might include issues of succession in respect to responsibility of States for wrongs caused to other actors, namely international organizations, and responsibility of member States in connection with acts of the organization. The Special Rapporteur indicated he would not examine the question of succession of governments.

249. Turning to specific comments on the draft articles, the Special Rapporteur indicated that he was amenable to suggestions to reflect in draft article 1 some reference to "rights and obligations arising out of an internationally wrongful act". He found the suggestion not to include a definition in draft article 2 for "international responsibility" logical, as it could be addressed in the commentary. The Special Rapporteur indicated that additional definitions would be included as the work progressed. He further indicated that draft article 2, subparagraph (a), had not taken a position on the question of the legality of succession, an issue that would be addressed in his next report.

250. Regarding the need to examine and set out a general rule on succession prior to setting out draft articles 3 and 4 on agreements and unilateral declarations, respectively, the Special Rapporteur noted that those draft articles were not just "without prejudice" clauses, as they referred to both form and substance, underlining the subsidiary nature of the draft articles. The Special Rapporteur maintained that having those draft articles at the commencement of the work was useful and would avoid the need to repeat references to agreements and unilateral agreements in each of draft articles that would follow. He indicated that his subsequent reports would propose a set of rules for different categories of succession, and not replace a general rule on non-succession with a general rule on succession.

251. Furthermore, the Special Rapporteur expressed his support for the proposals made concerning an explicit draft article on the subsidiary nature of the articles, as well as ensuring that the Commission's previous work relating to the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations was fully captured in draft article 4.

252. With respect to the final form that the topic should take, the Special Rapporteur reaffirmed his preference for draft articles, noting that the topic would include codification and the development of new norms. He noted that experience with the 1978 and 1983 Vienna Conventions showed that States could use the principles embodied in conventions for their succession even when they were not in force. The subsidiary nature of the rules would allow sufficient flexibility for different situations.

Chapter X
Protection of the environment in relation to armed conflicts

A. Introduction

253. At its sixty-fifth session (2013), the Commission decided to include the topic "Protection of the environment in relation to armed conflicts" in its programme of work, and appointed Ms. Marie G. Jacobsson as Special Rapporteur for the topic.[829]

254. The Commission received and considered three reports from the sixty-sixth session (2014) to the sixty-eighth session (2016).[830] At its sixty-sixth session (2014), the Commission considered the preliminary report of the Special Rapporteur.[831] At its sixty-seventh session (2015), the Commission considered the second report of the Special Rapporteur[832] and took note of the draft introductory provisions and draft principles, provisionally adopted by the Drafting Committee, which were subsequent were renumbered and revised for technical reasons by the Drafting Committee at the sixty-eighth session.[833] Accordingly, the Commission provisionally adopted draft principles 1, 2, 5, 9, 10, 11, 12 and 13, and commentaries thereto, at that session.[834] At the sixth-eighth session, the Commission also considered the third report of the Special Rapporteur,[835] and took note of draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee,[836] without provisionally adopting any commentaries.

B. Consideration of the topic at the present session

255. At the present session, the Commission had no report on the topic as the Special Rapporteur was no longer with the Commission. At its 3375th meeting, on 14 July 2017, the Commission decided to establish a Working Group on the topic and appointed Mr. Marcelo Vázquez-Bermúdez as chairperson of the Working Group.

256. The Working Group held two meetings on 26 and 27 July 2017. The Working Group had before it the draft commentaries prepared by the Special Rapporteur, even though she was no longer with the Commission, on draft principles 4, 6 to 8, and 14 to 18 provisionally adopted by the Drafting Committee at the sixty-eighth session, and taken note of by the Commission at the same session.

257. The Working Group focused its discussion on the consideration of the way forward in relation to the topic. The Working Group expressed its deep appreciation to the former Special Rapporteur for her outstanding contribution to the topic.

258. The Working Group stressed the importance of the topic, noting in particular the continuing interest of States, as well as other bodies, such as the United Nations Environment Programme and the International Committee of the Red Cross. In that connection, the Working Group noted that substantial work had already been done on the topic and underlined the need for its completion, maintaining and building upon the work

---

[829] The decision was made at the 3171st meeting of the Commission, on 28 May 2013 (see *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 167). For the syllabus of the topic, *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), annex E.

[830] A/CN.4/674 and Corr.1 (preliminary report), A/CN.4/685 (second report) and A/CN.4/700 (third report).

[831] *Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 186-222.

[832] *Ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 130-170.

[833] A/CN.4/L.870 and A/CN.4/L.870/Rev.1.

[834] *Official Records of the General Assembly, Seventy-first Session, Supplement No. 10* (A/71/10), para. 188.

[835] *Ibid.*, paras. 139-189.

[836] A/CN.4/L.876.

achieved so far. The Working Group underscored the need to maintain momentum on work on the topic.

259. The Working Group noted that, in addition to aspects of the draft principles, such as streamlining, terminology, filling gaps, and overall structuring of the text, as well as completion of the draft commentaries, there were other areas that could be further addressed. In that regard, references were made, *inter alia*, to issues of complementarity with other relevant branches of international law, such as international environmental law, protection of the environment in situations of occupation, issues of responsibility and liability, the responsibility of non-State actors, and overall application of the draft principles to armed conflicts of a non- international character.

260. Accordingly, the Working Group considered it most appropriate to recommend to the Commission the appointment of a new Special Rapporteur for the topic, preferably at the current session, to assist it in the successful completion of its work on the topic.

261. At its 3385th meeting, on 2 August 2017, the Commission received the oral report of the Chairperson of the Working Group.

262. Following consultations within the Bureau and among members, the Commission decided, at its 3389th meeting, on 4 August 2017, to appoint Ms. Marja Lehto as Special Rapporteur.

Chapter XI
Other decisions and conclusions of the Commission

A. Succession of States in respect of State responsibility

263. At its 3354th meeting, on 9 May 2017, the Commission decided to include the topic "Succession of States in respect of State responsibility" in its programme of work and to appoint Mr. Pavel Šturma as Special Rapporteur.

B. Programme, procedures and working methods of the Commission and its documentation

264. At its 3350th meeting, on 3 May 2017, the Commission established a Planning Group for the present session.

265. The Planning Group held five meetings. It had before it section H, entitled "Other decisions and conclusions of the Commission", of the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-first session; General Assembly resolution 71/140 of 13 December 2016 on the report of the International Law Commission on the work of its sixty-eighth session; and General Assembly resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels.

1. Working Group on the Long-term Programme of Work

266. At its 2nd meeting, on 9 May 2017, the Planning Group decided to establish the Working Group on the Long-term Programme of Work, under the chairpersonship of Mr. Mahmoud D. Hmoud. The Chairperson of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 5th meeting, on 28 July 2017. The Planning Group took note of the oral report.

267. At the present session, the Commission, on the recommendation of the Working Group, decided to recommend the inclusion of the following topics in the long-term programme of work of the Commission: (a) general principles of law; and (b) evidence before international courts and tribunals. In the selection of the topics, the Commission was guided by its recommendation at its fiftieth session (1998) regarding the criteria for the selection of the topics, namely: (a) the topic should reflect the needs of States in respect of the progressive development and codification of international law; (b) the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification; and (c) the topic should be concrete and feasible for progressive development and codification. The Commission further agreed that it should not restrict itself to traditional topics, but could also consider those that reflect new developments in international law and pressing concerns of the international community as a whole. The Commission considered that the two topics constituted useful contributions to the progressive development of international law and its codification. The syllabuses of the two topics selected appear as annexes A and B to the present report.

2. Work programme of the Commission for the remainder of the quinquennium

268. The Commission recalled its decision in 2011 that the Planning Group should cooperate with Special Rapporteurs to define, at the beginning of any new topic, a tentative schedule for the development of the topic over a number of years as may be required, and periodically review the attainment of annual targets in such schedule, updating it when appropriate.[837] The Commission further recalled that it was customary at the beginning of each quinquennium to prepare the Commission's work programme for the remainder of the

---

[837] *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 378.

quinquennium setting out in general terms the anticipated goals in respect of each topic on the basis of indications by the Special Rapporteurs. It is the understanding of the Commission that the work programme has a tentative character since the nature and the complexities of the work preclude certainty in making predictions in advance.

Work programme (2018-2021)

(a) Immunity of State officials from foreign criminal jurisdiction

2018

Sixth report: discussing procedural provisions and safeguards applicable.

Completion of the draft articles on first reading.

2020

Seventh (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft articles adopted on first reading in 2018.

Completion of the draft articles on second reading.

(b) Subsequent agreements and subsequent practice in relation to the interpretation of treaties

2018

Fifth (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft conclusions adopted on first reading in 2016.

Completion of the draft conclusions on second reading.

(c) Provisional application of treaties

2018

Fifth report: proposing additional draft guidelines and model clauses.

Completion of the draft guidelines on first reading.

2020

Sixth (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft guidelines adopted on first reading in 2018.

Completion of the draft guidelines on second reading.

(d) Identification of customary international law

2018

Fifth (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft conclusions adopted on first reading in 2016.

Completion of the draft conclusions on second reading.

Consideration of the memorandum by the Secretariat on ways and means for making the evidence of customary international law more readily available: surveying the present state of the evidence of customary international law and making suggestions for its improvement. Any recommendations in that regard would be made by the Commission during its 2018 session or possibly in 2019.

(e) Protection of the environment in relation to armed conflicts

2018

First report: issues covered to be determined by the new Special Rapporteur.

Completion of commentaries for draft principles adopted by the Drafting Committee and taken note of by the Commission in 2016.

2019

Second report and completion of the draft principles on first reading.

2021

Third (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft principles adopted on first reading in 2019.

Completion of the draft principles on second reading.

(f) Protection of the atmosphere

2018

Fifth report: addressing implementation, compliance, and dispute settlement.

Completion of draft guidelines on first reading.

2020

Sixth (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft guidelines adopted on first reading.

Completion of the draft guidelines on second reading.

(g) Crimes against humanity

2019

Fourth (and final) report: discussing *inter alia* the comments received from Governments, international organizations and others, and possible amendments to the draft articles adopted on first reading in 2017.

Completion of the draft articles on second reading.

(h) Peremptory norms of general international law (*jus cogens*)

2018

Third report: addressing consequences.

2019

Fourth report addressing miscellaneous issues.

Completion of the draft conclusions on first reading.

2021

Fifth (and final) report: discussing *inter alia* the comments received from Governments and possible amendments to the draft conclusions adopted on first reading.

Completion of the draft conclusions on second reading.

(i) Succession of States in respect of State responsibility

2018

Second report: addressing the issues of transfer of the obligations arising from the internationally wrongful act of the predecessor State, distinguishing between cases where the predecessor State has disappeared (dissolution, unification) and cases where the predecessor State remains (territorial transfer, secession, newly independent States).

2019

Third report: focusing on the transfer of the rights or claims of an injured predecessor State to the successor State.

2020

Fourth report: addressing procedural and miscellaneous issues, including the plurality of successor States and the issue of shared responsibility, and the possible application of rules on succession of States in respect of State responsibility to injured international organizations or to injured individuals.

Completion of the draft articles on first reading, or at the latest in 2021.

3. Consideration of General Assembly resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels

269. The General Assembly, in resolution 71/148 of 13 December 2016 on the rule of law at the national and international levels, *inter alia*, reiterated its invitation to the Commission to comment, in its report to the General Assembly, on its current role in promoting the rule of law. Since its sixtieth session (2008), the Commission has commented annually on its role in promoting the rule of law. The Commission notes that the comments contained in paragraphs 341 to 346 of its 2008 report[838] remain relevant and reiterates the comments made at its previous sessions.[839]

270. The Commission recalls that the rule of law is of the essence of its work. The Commission's purpose, as set out in article 1 of its statute, is to promote the progressive development of international law and its codification.

271. Having in mind the principle of the rule of law in all its work, the Commission is fully conscious of the importance of the implementation of international law at the national level, and aims at promoting respect for the rule of law at the international level.

272. In fulfilling its mandate concerning the progressive development of international law and its codification, the Commission will continue to take into account, where appropriate, the rule of law as a principle of governance and the human rights that are fundamental to the rule of law, as reflected in the preamble and in Article 13 of the Charter of the United Nations and in the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels.[840]

273. In its current work, the Commission is aware of "the interrelationship between the rule of law and the three pillars of the United Nations (peace and security, development, and human rights)",[841] without emphasizing one at the expense of the other. In this context the Commission is cognizant that the 2030 Agenda for Sustainable Development recognizes the need for an effective rule of law and good governance at all levels.[842] In fulfilling its mandate concerning the progressive development and codification of international law, the Commission is conscious of current challenges for the rule of law.

274. Noting that the General Assembly has stressed the importance of promoting the sharing of national best practices on the rule of law,[843] the Commission wishes to recall that much of its work consists in collecting and analysing national practices related to the rule of law with a view to assessing their possible contribution to the progressive development and codification of international law. The Commission underlines the value of State responses to its requests in this regard.

---

[838] *Ibid., Sixty-third Session, Supplement No. 10* (A/63/10).

[839] *Ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 231; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), paras. 390-393; *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), paras. 392-398; *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), paras. 274-279; *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), paras. 171-179; *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), paras. 273-280; *ibid., Seventieth Session, Supplement No. 10* (A/70/10), paras. 288-295; *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), paras. 314-322.

[840] General Assembly resolution 67/1 of 30 November 2012 on the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, para. 41.

[841] Report of the Secretary-General on measuring the effectiveness of the support provided by the United Nations system for the promotion of the rule of law in conflict and post-conflict situations, S/2013/341, 11 June 2013, para. 70.

[842] General Assembly resolution 70/1 of 21 October 2015, para. 35.

[843] General Assembly resolution 71/148 of 13 December 2016, paras. 15 and 21.

275. Bearing in mind the role of multilateral treaty processes in advancing the rule of law,[844] the Commission recalls that the work of the Commission on different topics has led to several multilateral treaty processes and to the adoption of a number of multilateral treaties.[845]

276. The Commission welcomes the decision of the General Assembly to select "Ways and means to further disseminate international law to strengthen the rule of law" as the thematic subject for the debate in the Sixth Committee in 2017. In this connection, the Commission recalls that it has requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement.

277. In the course of the present session, the Commission has continued to make its contribution to the rule of law, including by working on the topics, "Crimes against humanity" (adopted on first reading at the current session), "Provisional application of treaties", "Protection of the atmosphere", "Immunity of State officials from foreign criminal jurisdiction", "Peremptory norms of general international law (*jus cogens*)", and "Protection of the environment in relation to armed conflicts". The Commission has begun consideration of a new topic, "Succession of States in respect of State responsibility". The other topics on the current work programme of the Commission, are: "Identification of customary international law" and "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" (both adopted on first reading at the previous session of the Commission).

278. The Commission reiterates its commitment to the rule of law in all of its activities.

4. Seventieth anniversary session of the International Law Commission

279. At its 2nd meeting, on 9 May 2017, the Planning Group established an advisory group[846] on the commemoration of the seventieth anniversary of the Commission. The advisory group will continue to work intersessionally, together with the Secretariat, towards the convening of the commemorative events.

280. The Commission recommends that during the first part of its seventieth session that is to be held in New York:

(a) a solemn half-day meeting of the Commission be held on 21 May 2018 to which would be invited high-level dignitaries, including the President of the General Assembly, the Secretary-General of the United Nations, and President of the International Court of Justice;

(b) an informal half-day meeting be held with delegates to the Sixth Committee of the General Assembly, also on 21 May 2018, to exchange views on the work of the Commission, the relationship between the Commission and the Sixth Committee, and the role of both bodies in the promotion of the progressive development and codification of international law;

(c) during the second part of its seventieth session in Geneva, a one and a half-day conference be held on 5 and 6 July with legal advisers of States and international organizations, academics and other distinguished international lawyers, dedicated to the work of the Commission. The conference would be preceded by a high-level opening session, to which would be invited high-level dignitaries.

281. The commemorative events will be organized under the following theme: "70 years of the International Law Commission — Drawing a balance for the future".

---

[844] *Ibid.*, para. 8.

[845] See more specifically *Official Records of the General Assembly, Seventieth Session, Supplement No. 10* (A/70/10), para. 294.

[846] The Advisory Group was composed of: the Chairperson of the Commission, the Chairperson of the Planning Group, Mr. Yacouba Cissé, Mr. Shinya Murase and Mr. Pavel Šturma.

5. Honoraria

282. The Commission reiterates its views concerning the question of honoraria, resulting from the adoption by the General Assembly of its resolution 56/272 of 27 March 2002, which has been expressed in the previous reports of the Commission.[847] The Commission emphasizes that resolution 56/272 especially affects Special Rapporteurs, as it compromises support for their research work.

6. Working Group on methods of work of the Commission

283. At its 1st meeting, on 3 May 2017, the Planning Group decided to establish a Working Group on methods of work of the Commission, under the chairmanship of Mr. Hussein Hassouna.[848] The Chairperson of the Working Group presented an oral report on the work of the Working Group at the current session to the Planning Group, at its 5th meeting, on 28 July 2017. Planning Group took note of the oral report.

7. Documentation and publications

284. The Commission underscores the unique nature of its functioning in the progressive development of international law and its codification, in that it attaches particular relevance to State practice and the decisions of national and international courts in its treatment of questions of international law. The Commission reiterates the importance of providing and making available all evidence of State practice and other sources of international law relevant to the performance of the function of the Commission. The reports of its Special Rapporteurs require an adequate presentation of precedents and other relevant data, including treaties, judicial decisions and doctrine, and a thorough analysis of the questions under consideration. The Commission wishes to stress that it and its Special Rapporteurs are fully conscious of the need to achieve economies whenever possible in the overall volume of documentation and will continue to bear such considerations in mind. While the Commission is aware of the advantages of being as concise as possible, it reiterates its strong belief that an *a priori* limitation cannot be placed on the length of the documentation and research projects relating to the work of the Commission. It follows that Special Rapporteurs cannot be asked to reduce the length of their report following submission to the Secretariat, irrespective of any estimates of their length made in advance of submission by the Secretariat. Word limits are not applicable to Commission documentation, as has been consistently reiterated by the General Assembly.[849] The Commission stressed also the importance of the timely preparation of reports by Special Rapporteurs and their submission to the Secretariat for processing and submission to the Commission sufficiently

---

[847] See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 10* (A/57/10), paras. 525-531; *ibid., Fifty-eighth Session, Supplement No. 10* (A/58/10), para. 447; *ibid., Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 369; *ibid., Sixtieth Session, Supplement No. 10* (A/60/10), para. 501; *ibid., Sixty-first Session, Supplement No. 10* (A/61/10), para. 269; *ibid., Sixty-second Session, Supplement No. 10* (A/62/10), para. 379; *ibid., Sixty-third Session, Supplement No. 10* (A/63/10), para. 358; *ibid., Sixty-fourth Session, Supplement No. 10* (A/64/10), para. 240; *ibid., Sixty-fifth Session, Supplement No. 10* (A/65/10), para. 396; *ibid., Sixty-sixth Session, Supplement No. 10* (A/66/10), para. 399; *ibid., Sixty-seventh Session, Supplement No. 10* (A/67/10), para. 280; *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 181; *ibid., Sixty-ninth Session, Supplement No. 10* (A/69/10), para. 281; and *ibid., Seventieth Session, Supplement No. 10* (A/70/10), para. 299; *ibid., Seventy-first Session, Supplement No. 10* (A/71/10), para. 333.

[848] The Working Group was composed of Mr. Hussein A. Hassouna (Chairperson), Mr. Yacouba Cissé, Ms. Concepción Escobar Hernández, Ms. Patrícia Galvão Teles, Mr. Claudio Grossman Guiloff, Mr. Charles Chernor Jalloh, Ms. Marja Lehto, Mr. Shinya Murase, Mr. Sean D. Murphy, Mr. Hong Thao Nguyen, Mr. Georg Nolte, Ms. Nilüfer Oral, Mr. Hassan Ouazzani Chahdi, Mr. Ki Gab Park, Mr. Aniruddha Rajput, Mr. August Reinisch, Mr. Juan José Ruda Santolaria, Mr. Pavel Šturma, Mr. Dire D. Tladi, Mr. Eduardo Valencia-Ospina, Mr. Marcelo Vázquez-Bermúdez, and Sir Michael Wood.

[849] For considerations relating to page limits on the reports of Special Rapporteurs, see for example, *Yearbook ... 1977*, vol. II (Part Two), p. 132, and *Yearbook ... 1982*, vol. II (Part Two), pp. 123-124. See also General Assembly resolution 32/151 of 9 December 1977, para. 10, and General Assembly resolution 37/111 of 16 December 1982, para. 5, as well as subsequent resolutions on the annual reports of the Commission to the General Assembly.

in advance so that the reports are issued in all official languages ideally four weeks before the start of the relevant part of the session of the Commission. In this respect, the Commission reiterated its request that: (a) Special Rapporteurs submit their reports within the time limits specified by the Secretariat; and (b) the Secretariat continue to ensure that official documents of the Commission are published in due time in the six official languages of the United Nations.

285. The Commission reiterated its recognition of the particular relevance and significant value to the work of the Commission of the legal publications prepared by the Secretariat.[850] The Commission noted with appreciation the efforts of the Secretariat aimed at resuming desktop publishing, which in the past had greatly enhanced the timely issuance of such publications for the Commission, despite constraints due to lack of resources. The Commission expressed its appreciation for the issuance at the beginning of the present quinquennium, of the ninth edition of *The Work of the International Law Commission*, a vital tool in the Commission's work, and urged that its early availability in the various official languages be ensured.

286. The Commission reiterated its firm view that the summary records of the Commission, constituting crucial *travaux préparatoires* in the progressive development and codification of international law, cannot be subject to arbitrary length restrictions. The Commission once more noted with satisfaction that the measures introduced at its sixty-fifth session (2013) to streamline the processing of its summary records had resulted in their more expeditious transmission to members of the Commission of the English and French versions for timely correction and prompt release. The Commission called on the Secretariat to resume the practice of preparing summary records in English and French, and to continue its efforts to sustain the measures in question, in order to ensure the expeditious transmission of the provisional records to members of the Commission. The Commission also welcomed the fact that these working methods had led to the more rational use of resources and called on the Secretariat to continue its efforts to facilitate the preparation of the definitive records in all official languages, without compromising their integrity.

287. The Commission expressed its gratitude to all Services involved in the processing of documents, both in Geneva and in New York, for their efforts in seeking to ensure timely and efficient processing of the Commission's documents, often under narrow time constraints. It emphasized that timely and efficient processing of documentation was essential for the smooth conduct of the Commission's work.

288. The Commission reaffirmed its commitment to multilingualism and recalls the paramount importance to be given in its work to the equality of the six official languages of the United Nations, which has been emphasized in General Assembly resolution 69/324 of 11 September 2015.

289. The Commission expressed its warm appreciation to the United Nations Office at Geneva Library, which continues to assist members of the Commission very efficiently and competently.

8. *Yearbook of the International Law Commission*

290. The Commission reiterated that the *Yearbook of the International Law Commission* was critical to the understanding of the Commission's work in the progressive development of international law and its codification, as well as in the strengthening of the rule of law in international relations. The Commission took note that the General Assembly, in its resolution 71/140, expressed its appreciation to governments that had made voluntary contributions to the trust fund on the backlog relating to the *Yearbook*, and encouraged further contributions to the trust fund.

291. The Commission recommends that the General Assembly, as in its resolution 71/140, express its satisfaction with the remarkable progress achieved in the past few years in catching up with the backlog of the *Yearbook* in all six languages, and welcome the

---

[850] See *Official Records of the General Assembly, Sixty-second Session, Supplement No. 10* (A/62/10), paras. 387-395. See also *ibid., Sixty-eighth Session, Supplement No. 10* (A/68/10), para. 185.

efforts made by the Division of Conference Management, especially the Editing Section of the United Nations Office at Geneva in effectively implementing relevant resolutions of the General Assembly calling for the reduction of the backlog; and encourage the Division of Conference Management to continue providing all necessary support to the Editing Section in advancing work on the *Yearbook*.

9. Assistance of the Codification Division

292. The Commission expressed its appreciation for the invaluable assistance of the Codification Division of the Secretariat in its substantive servicing of the Commission and, the ongoing assistance provided to Special Rapporteurs and the preparation of in-depth research studies pertaining to aspects of topics presently under consideration, as requested by the Commission. In particular, the Commission expressed its appreciation to the Secretariat for its preparation of a memorandum on provisional application of treaties (A/CN.4/707).

10. Websites

293. The Commission expressed its deep appreciation to the Secretariat for the website on the work of the Commission, and welcomed its continuous updating.[851] The Commission reiterated that the website and other websites maintained by the Codification Division[852] constitute an invaluable resource for the Commission and for researchers of the work of the Commission in the wider community, thereby contributing to the overall strengthening of the teaching, study, dissemination and wider appreciation of international law. The Commission welcomed the fact that the website on the work of the Commission included information on the current status of the topics on the agenda of the Commission, as well as links to the advance edited versions of the summary records of the Commission and the audio recording of the plenary meetings of the Commission.

11. United Nations Audiovisual Library of International Law

294. The Commission once more noted with appreciation the extraordinary value of the United Nations Audiovisual Library of International Law in promoting a better knowledge of international law and the work of the United Nations in the field, including the work of the International Law Commission.

C. Date and place of the seventieth session of the Commission

295. The Commission decided that the seventieth session of the Commission would be held in New York from 30 April to 1 June and in Geneva from 2 July to 10 August 2018.

D. Cooperation with other bodies

296. At the 3380th meeting, on 25 July 2017, Judge Abraham, President of the International Court of Justice, addressed the Commission and briefed it on the recent judicial activities of the Court.[853] An exchange of views followed.

297. The Committee of Legal Advisers on Public International Law of the Council of Europe was represented at the present session of the Commission by the Chair of the Committee, Ms. Päivi Kaukoranta, and the Head of the Public International Law Division and Treaty Office of the Directorate of Legal Advice and Public International Law and Secretary of the Committee, Ms. Marta Requena, both of whom addressed the Commission at its 3371st meeting, on 6 July 2017.[854] They focused on the current activities of the

---

[851] http://legal.un.org//ilc.

[852] In general, available from: http://legal.un.org/cod/.

[853] The statement is recorded in the summary record of that meeting.

[854] The statements are recorded in the summary record of that meeting.

Committee in the field of public international law, as well of the Council of Europe. An exchange of views followed.

298. The African Union Commission on International Law was represented at the present session of the Commission by Ms. Juliet Kalema, member of the African Union Commission, and Ms. Hajer Gueldich, its General Rapporteur, accompanied by Mr. Adewale Iyanda, Acting Head of its Secretariat and Senior Legal Officer. Ms. Kalema and Ms. Gueldich addressed the Commission at its 3376th meeting, on 18 July 2017.[855] They gave an overview of the activities of the African Union Commission on the various legal issues that the Commission had been engaged in since its establishment. An exchange of views followed.

299. The Asian-African Legal Consultative Organization was represented at the present session of the Commission by its Secretary-General, Mr. Kennedy Gastorn, who addressed the Commission at its 3377th meeting, on 19 July 2017. He briefed the Commission on the organization and provided an overview of its deliberations at its fifty-sixth annual session held in Nairobi from 1 to 5 May 2017, which focused, *inter alia*, on three topics on the programme of work of the Commission, namely, "Protection of the atmosphere"; "*Jus cogens*" and "Immunity of State officials from foreign criminal jurisdiction". An exchange of views followed.

300. The Inter-American Juridical Committee was represented at the present session of the Commission by its President, Mr. Hernán Salinas, who addressed the Commission at the 3379th meeting, on 21 July 2017.[856] He gave an overview of the activities of the Committee on various legal issues, focusing in particular on the period between 2016 and 2017. An exchange of views followed.

301. On 11 July 2017, an informal exchange of views was held between members of the Commission and the International Committee of the Red Cross (ICRC) on topics of mutual interest. Following statements made by Ms. Christine Beerli, Vice-President of ICRC, Mr. Knut Dörmann, Chief Legal Officer and Head of the Legal Division at ICRC, and Mr. Eduardo Valencia-Ospina, Vice-Chairperson of the Commission, presentations were made on the topics "Crimes against humanity" by Mr. Sean D. Murphy and "Immunity of State officials from foreign criminal jurisdiction" by Ms. Concepción Escobar Hernández. Further presentations were made on "Legal considerations for States supporting parties to armed conflict", by Mr. David Turk, Legal Adviser in the Operations Unit at ICRC; "The ICRC commentaries on the Geneva Conventions and additional protocols: update on the project with particular focus on international criminal law, universal jurisdiction and immunities" by Ms. Eve La Haye, Legal Adviser in the Commentaries Update Unit in the Legal Division of ICRC. Those presentations were followed by a discussion. Concluding remarks were made by Ms. Helen Durham, Director of International Law and Policy at ICRC.

E. Representation at the seventy-second session of the General Assembly

302. The Commission decided that it should be represented at the seventy-second session of the General Assembly by its Chairperson, Mr. Georg Nolte.

F. International Law Seminar

303. Pursuant to General Assembly resolution 71/140 of 13 December 2016, the fifty-third session of the International Law Seminar was held at the Palais des Nations from 3 to 21 July 2017, during the present session of the Commission. The Seminar is intended for young jurists specializing in international law, and young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their countries.

---

[855] *Idem*

[856] *Idem*

304. Twenty-three participants of different nationalities, from all regional groups, took part in the session.[817] The participants attended plenary meetings of the Commission and specially arranged lectures, and participated in working groups on specific topics.

305. Mr. Georg Nolte, Chairperson of the Commission, opened the Seminar. Mr. Markus Schmidt, Senior Legal Adviser to the United Nations Office at Geneva, was responsible for the administration, organization and conduct of the Seminar and served as its Director. The University of Geneva ensured the scientific coordination of the Seminar. Mr. Vittorio Mainetti, international law expert from the University of Geneva, acted as coordinator, assisted by Mr. Alessandro Mario Amoroso and Ms. Yusra Suedi, legal assistants.

306. The following lectures were given by members of the Commission: "The International Law Commission viewed from inside" by Mr. Eduardo Valencia-Ospina; "Freedom of expression in the Western Hemisphere" by Mr. Claudio Grossman Guiloff; "Delimitation of maritime boundaries" by Mr. Yacouba Cissé; "The principle of universal jurisdiction" by Mr. Charles Chernor Jalloh; "The International Law Commission viewed from outside" by Ms. Patrícia Galvão Teles; "Identification of customary international law" by Sir Michael Wood; "Protection of the atmosphere" by Mr. Shinya Murase; "Immunity of State officials from foreign criminal jurisdiction" by Ms. Concepción Escobar Hernández; "Crimes against humanity" by Mr. Sean D. Murphy; "*Jus cogens*" by Mr. Dire D. Tladi; "State succession in relation to State responsibility" by Mr. Pavel Šturma; and "Provisional application of treaties" by Mr. Juan Manuel Gómez Robledo.

307. A lecture was given by Ms. Jelena Pejic, Senior Legal Adviser in the Legal Division of ICRC, on "Current challenges to international humanitarian law".

308. Participants also attended a workshop organized by the University of Geneva on "Experts in international law". The following speakers made presentations: Ms. Laurence Boisson de Chazournes, Professor at the University of Geneva; Mr. Makane M. Mbengue, Professor of International Law at the University of Geneva; Mr. Guillaume Gros, Researcher at the University of Geneva; Ms. Rukmini Das, Researcher at the University of Geneva; Ms. Mara Tignino, Senior Lecturer at the University of Geneva; Ms. Danae Azaria, Lecturer at University College London; and Mr. Sean D. Murphy, Professor at George Washington University and member of the Commission.

309. Participants visited the International Labour Organization (ILO), guided by Mr. Remo Becci, Director of the ILO Archives, and attended two presentations given by Mr. Dražen Petrović, Registrar of the ILO Administrative Tribunal, and Mr. Georges Politakis, ILO Legal Adviser. They also visited the World Trade Organization (WTO), guided by Mr. Gerard Penalosa, and attended a presentation on "The dispute settlement process at WTO and WTO jurisprudence on treaty interpretation" by Mr. Graham Cook from the WTO Legal Affairs Division. Participants also had an informal talk with three members of the WTO Appellate Body: Mr. Peter Van Den Bossche, Mr. Thomas Graham and Mr. Shree Servansing. Finally, they visited the Office of the United Nations High Commissioner for Refugees (UNHCR) and attended a presentation on "UNHCR mandate and activities" by Mr. Semih Bulbul, Senior Programme Analyst at UNHCR.

310. Two working groups, on identifying new topics for the Commission and clarification of the scope and application of the principle of universal jurisdiction, were

---

[817] The following persons participated in the Seminar: Ms. Nour Al Saud (Saudi Arabia), Ms. Onesis Bolaño Prada (Cuba), Ms. Xinling Mary-Elisabeth Chong (Singapore), Ms. Paula Cortés (Chile), Ms. Duangpon Darongsuwan (Thailand), Ms. Alero Itohan Fenemigho (Nigeria), Ms. Coumba Gaye (Senegal), Mr. Artur Gulasarian (Russian Federation), Mr. Yuki Hirotani (Japan), Ms. Nany Hur (Republic of Korea), Mr. Moise Jean (Haiti), Mr. Samuel Matsiko (Uganda), Mr. Georgi Minkov (Bulgaria), Mr. Antonio Morelli (Italy), Ms. Carine Pilo Selangai (Cameroon), Ms. Valeria Reyes Menéndez (Peru), Mr. Ahmed Medhat Riad (Egypt), Ms. Verity Robson (United Kingdom of Great Britain and Northern Ireland), Mr. Moritz Rudolf (Germany), Ms. Dildora Umarkhanova (Uzbekistan), Mr. José Villarroel Alarcón (Plurinational State of Bolivia), Mr. Blaise Pascal Zirimwabagabo Migabo (Democratic Republic of the Congo) and Ms. Enyovi Adjo Zohou (Togo). The Selection Committee, chaired by Mr. Makane Moise Mbengue, Professor of International Law at the University of Geneva, met on 24 April 2017 and selected 23 candidates from the 129 applicants.

organized and participants were assigned to one of them. Two members of the Commission, Ms. Patrícia Galvão Teles and Mr. Charles Chernor Jalloh, supervised and provided guidance to the working groups. Each group prepared a report and presented its findings during the last working session of the Seminar. The reports were compiled and distributed to all participants, as well as to the members of the Commission.

311. The Republic and Canton of Geneva offered its traditional hospitality at the Geneva Town Hall, where the participants visited the premises of the cantonal authorities and the Alabama room, guided by Mr. Jean-Luc Chopard, Chief of Protocol.

312. The Chairperson of the Commission, the Director of the International Law Seminar and Ms. Paula Cortés, on behalf of participants attending the Seminar, addressed the Commission during the closing ceremony of the Seminar. Each participant was presented with a diploma.

313. The Commission noted with particular appreciation that since 2015 the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Switzerland and the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The Circolo di diritto internazionale, a private association for the promotion of international law based in Rome, also contributed to the Seminar. Though the financial crisis of recent years had seriously affected the finances of the Seminar, the Fund was still able to grant a sufficient number of fellowships to deserving candidates, especially those from developing countries, in order to achieve an adequate geographical distribution among participants. In 2017, 12 fellowships were granted.

314. Since its inception in 1965, 1,208 participants, representing 173 nationalities, have taken part in the Seminar. Some 736 participants have received a fellowship.

315. The Commission stresses the importance it attaches to the Seminar, which enables young lawyers, especially those from developing countries, to familiarize themselves with the work of the Commission and the activities of the many international organizations based in Geneva. The Commission recommends that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2018 with as broad participation as possible.

Annexes

A. General principles of law

Mr. Marcelo Vázquez-Bermúdez

1. Introduction

1. Sources are central to the whole system of international law. The International Law Commission has made a remarkable contribution in this sphere, especially on the law of treaties,[1] which led to the 1969 Vienna Convention on the Law of Treaties and other instruments.[2] This contribution has continued more recently with the "Guide to Practice on Reservations to Treaties" (A/66/10), the draft articles on "Effects of armed conflicts on treaties" (A/66/10), and, currently, with its work on "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", and on "Provisional application of treaties".

2. The Commission has also been working in the last few years on customary international law, another main source of international law. In 2016 it approved, on first reading, a set of conclusions with commentaries on "Identification of customary international law". It is expected that the work of the Commission on this topic would be completed, on second reading, in 2018.[3]

3. Within the context of other topics considered by the Commission, references have been made to general principles of law.[4] For instance, under the topic of "*jus cogens*" within the current agenda of the Commission, general principles of law are being analyzed as a source of peremptory norms of general international law.[5]

4. In line with its previous and current work on treaties and on customary international law, it is proposed that the International Law Commission includes in its Programme of Work a topic on the third of the three principal sources of international law, which is contained in Article 38(1)(c) of the Statute of the International Court of Justice, under the title "General Principles of Law". The Commission can provide an authoritative clarification on its nature, scope and functions, as well as on the way in which they are to be identified. The final outcome could be a set of conclusions with commentaries. A

---

[1] Topics in relation to treaties considered by the International Law Commission: *Law of Treaties* (1949-1966); *Reservations to multilateral conventions* (1951); *Extended participation in general multilateral treaties concluded under the auspices of the League of Nations* (1963); *Succession of States in respect of treaties* (1968-1974); *Treaties concluded between States and international organizations, or between international organizations* (1970-1982); *Reservations to treaties* (1993-2011); *Effects of armed conflicts on treaties* (2004-2011); *Subsequent agreements and subsequent practice in relation to the interpretation of treaties, formerly Treaties over time* (2018-present); *Provisional application of treaties* (2012-present). Information available at: http://legal.un.org/ilc/.

[2] Vienna Convention on the Law of Treaties, of May 23, 1969; Vienna Convention on the Succession of States in Respect of Treaties, of August 23, 1978; and Vienna Convention on the Law of Treaties Concluded Between States and International Organizations, or between International Organizations.

[3] *Identification of customary international law, formerly Formation and evidence of customary international law* (2013-present). The Commission had previously considered the topic *Ways and means of making the evidence of customary international law more readily available* (1949-1950). Information available at: http://legal.un.org/ilc/.

[4] E.g., Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Yearbook of the ILC (2006); State responsibility, Yearbook of the ILC (2001); Responsibility of international organizations, Yearbook of the ILC (2011); Draft Code of Crimes Against the Peace and Security of Mankind, Yearbook of the ILC (1996) vol. II(2); Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Yearbook of the ILC (1950).

[5] Second report on *jus cogens* by Dire Tladi, Special Rapporteur, 16 March 2017, A/CN.4/706, paras. 48-52.

number of examples of general principles of law would be referred to in the commentaries, but the objective of the topic would not be to catalogue existing general principles of law.

2. Historical development of this concept

5. By the end of the 19th Century and the beginning of the 20th Century, concepts such as "general principles", "principles of natural justice", "general principles of law of nations", "generally recognized principles" had been resorted to in international arbitration on procedural as well as substantive questions when the given treaty provided no clear answer.[6] Conventions had also referred to "principles of law of nations", "principles of international law" and "general principles of justice and equity",[7] while the content and nature of these concepts were subject to controversy.

6. In 1920, "The general principles of law recognized by civilized nations" were included in the Statute of the Permanent Court of International Justice (PCIJ) as one of the three principal sources of international law to be applied by the Court. Within the Advisory Committee of Jurists, which was entrusted with the drafting of the Statute of the PCIJ, the meaning to be ascribed to, as well as the material content of, general principles of law has been one of the most debated issues.[8] While the positivist position of Elihu Root insisted that Judges could only decide in accordance with "recognized rules" and in their absence they "should pronounce *non-liquet*", others opposed and proposed language such as "rules of international law as recognized by the legal conscience of civilized nations", "principles of equity", "general principles of law and justice", "general principles of law and with the

---

[6] *Arakas (The Georgios)* Case (1927), Greco-Bulgarian Mix. Arb. Trib., 7 Rec. des Décisions des Trib. Arb. Mixtes Institués par les Traités de Paix, 43-45 (on *audiatur et altera pars*); *Turnbull, Manoa Co. Ltd., Orinoco Co. Ltd.* Cases (1903), U. S.-Venezuelan Mix. Cl. Comm., Ralston and Doyle, Venezuelan Arbitrations of 1903, etc. 200 at 244 (1904) (on *Nemo Judex in sua propria causa*); *Rio Grande* Case (1923), Nielsen, American and British Claims Arbitrations under the Special Agreement concluded between the U. S. and Great Britain, Aug. 18, 1910, 332, at 342 (1926) (on *competence-competence*); *Valentiner* Case (1903), German-Venezuelan Mix.Cl. Comm., Ralston and Doyle, Venezuelan Arbitrations of 1903 etc. 562, at 564 (1904) (on presumption of the validity of acts).

[7] Hague Convention for the Pacific Settlement of International Disputes (1899), Article 48 provides that "The Tribunal is authorized to declare its competence in interpreting the compromis as well as the other Treaties which may be invoked in the case, and in applying *the principles of international law*." (emphasis added); Hague Convention for the Pacific Settlement of International Disputes (1907), Article 73 has similar language as Article 48 of the Hague Convention 1899; the 'Martens Clause' in the Convention with Respect to the Laws of War on Land (Hague II) 29 July 1899 reads: "Until a more complete code of the law of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of *the principles of international law, as they result from the usages established between civilized nations, from the law of humanity and the requirements of the public conscience*" (emphasis added); the 'Marten Clause' in the Convention respecting the Laws and Customs of War on Land (Hague IV) 18 October 1907, which reads "[u]ntil a more complete code of the law of war has been issued, the high contracting parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of *the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience*" (emphasis added); The 1907 Convention for the Establishment of the Central American Court of Justice ([1908] 2 AJIL Supp 219), Article 7(1) and (2): "In deciding points of facts that may be raised before it, the Central American Court of Justice shall be governed by its free judgment, and with respect to points of law, by *the principles of international law*." (emphasis added); The Convention relative to the Establishment of an International Prize Court ([1908] 2 AJIL Supp 174), Article 7: "… In the absence of such provisions, the court shall apply the rules of international law. If no generally recognized rules exist, the Court shall give judgment in accordance with *the general principles of justice and equity*." (emphasis added)

[8] V. D. Degan, *Sources of International Law* (1997 Martinus Nijhoff) 41-53; Alain Pellet, "Article 38" in Andreas Zimmermann, Christian Tomuschat and Karin Oellers-Frahm, *The Statute of the International Court of Justice: A Commentary* (2002 OUP) 677-792.

consent of the parties, the general principles of justice recognized by civilized nations".[9] The finally adopted language in Article 38 of the Statute, "The Court shall apply […] 3. The general principles of law recognized by civilized nations", was regarded as a compromise between positivists and naturalists.[10]

7. However, doctrinal controversies concerning the nature and origin of this concept persist. Some considered the inclusion of general principles of law as a rejection of the positivistic doctrine, according to which international law consists solely of rules to which States have given their consent,[11] whereas others reject the reasoning of "objective justice" and insisted that general principles of law could only be recognized *in foro domestico* and their function is limited to "fill the gaps" left by treaties and customary international law.[12] Some have identified multiple origins from which general principles of law could be derived, which are not limited to those found in domestic laws.[13] Controversies surrounding the nature of general principles of law were also reflected in the discussions on general principles of law as a source of *jus cogens*.[14]

---

[9] Permanent Court of International Justice. See Advisory Committee of Jurists. Procès -Verbaux of the Proceedings of the Committee, June 16th – July 24th, 1920, The Hague 1920, 306, 333; League of Nations, the Records of the First Assembly, Meetings of the Committee, I, Geneva 1920, 385.

[10] ibid; See also Jean Spiropoulos, *Die allgemeinen Rechtsgrundsätze im Völkerrecht* (Verlag des Inst. f. Intern. Recht an der Univ. Kiel 1928) 66; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 24-26; V. D. Degan, 41-53.

[11] J. L. Brierly, *The Law of Nations* (Clarendon, 1955) 63; Shabtai Rosenne, *The Law and Practice of the International Court* (Martinus Nijhoff 1965) vol. II, 63.

[12] Max Sorensen, *Les sources du droit international* (E. Munksgaard, 1946) 113; W. Friedman, *The Changing Structure of International Law* (Stevens, 1964) 196; Geza Herczegh, *General Principles of Law and the International Legal Order* (International Publication Service 1969) 97-100; Int'l L. Assoc., Study Group on the Use of Domestic Law Principles for the Development of International Law, Working session 2016 (Aug.10), available at: http://www.ila-hq.org/index.php/study-groups.

[13] Oscar Schachter, *International Law in Theory and Practice: General Course on Public International Law* (Martinus Nijhoff 1982) 75-82 (According to him, general principles of law could be classified into five categories: 1) principles that exist in the municipal laws of States worldwide, e.g. *res judicata*; 2) principles derived from the specific nature of the international community, e.g. non-intervention and sovereign equality; 3) principles intrinsic to the idea of law, e.g. *lex specialis* and *lex posterior derogat priori* ; 4) principles "valid through all kinds of societies in relationships of hierarchy and co-ordination"; 5) principles of justice founded on "the very nature of man as a rational and social being"); Ch. Rousseau, *Principes généraux du droit international public*, Vol. I (Sources) (Pedone, 1944) 891 (He maintained that 'general principles of law' is not limited only to those of domestic law but comprises likewise general principles of international law.); for similar idea, see also Rüdiger Wolfrum, 'General International Law (Principles, Rules, and Standards) Max Planck Encyclopedia of Public International Law (2013 OUP); Brian D. Lepard, 'The Relationship between Customary International Law and General Principles of Law' in B. D. Lepard, *Customary International Law: A New Theory with Practical Applications* (2010 CUP) 162 (According to him, general principles of law include general principles of national law, general principles of moral law and general principles of international law).

[14] During the United Nations Conference on the Law of Treaties, Trinidad and Tobago expressed that *jus cogens* is primarily a rule of customary international law, which is because "not only that [general principles of law] was a most unlikely source of rules of *jus cogens*, but that it would be dangerous to rely on analogies with municipal law in a matter of such fundamental importance", see Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March to 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole, 56th meeting, paras. 63-64; but Iran expressed during the 26th meeting of the Sixth Committee in 2016 that general principles of law in the sense under Article 38 of the Statute of the ICJ "were the best normative foundation for norms of *jus cogens*", see Seventy-first session of the General Assembly, A/C.6/71/SR.26, para. 120; it was also expressed by the American Branch of the International Law Association that the customary law-making process may not logically lead to the emergence of peremptory norms of abstention, rather, the law-making process of general principles of law is better suited to meeting the requirements for the formation of *jus cogens*, see Committee on the Formation of Customary International Law, American Branch of the International Law Association: "The Role of State Practice in the Formation of Customary and *Jus Cogens* Norms of International Law" (January 19, 1989) 20; see also Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles' (1989) 12 Australian Yearbook of International

8. During the discussions dealing with the Statute of the International Court of Justice, it was proposed that "general principles recognized by civilized nations" should be followed by the wording "and especially the principles of international law".[15] After a discussion this proposal was modified, and the chapeau of paragraph 1 was finally changed to "The Court, whose function is to decide *in accordance with international law* such disputes as are submitted to it, shall apply: …" (emphasis added).[16] In this regard, some observed that this change was of no far-reaching consequences, as the application of international law was implicit in the old formulation.[17] But others like Tunkin suggested that "this amendment invalidates the understanding of Article 38(1)(c) that was prevailing in the Commission of Jurists in 1920… It clearly defines that 'general principles of law' are principles of international law".[18] He contended that general principles of law comprise those principles common to national legal systems and to international law: they are legal postulates followed "in national legal systems and in international law".[19]

9. Relevant concepts were defined in a more specific manner in international criminal law. According to Article 21 of the Rome Statute, the applicable law of the ICC includes "(a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and *principles and rules of international law*, including the established principles of the international law of armed conflict; (c) Failing that, *general principles of law derived by the Court from national laws of legal systems of the world*" (emphasis added).[20] Within the context of the Rome Statute, according to Pellet, "principles and rules of international law" is limited to customary international law whereas "general principles of law derived by the Court from national laws" corresponds to "general principles of law recognized by civilized nations" under Article 38(1)(c) of the ICJ Statute.[21] A similar order of the application of sources was maintained by the ICTY, but in some cases, it appeared to view "customary international law", "general principles of international law", "general principles of criminal law common to the major legal systems of the world" and "general principles of law consonant with the basic requirements of international justice" as independent sources.[22]

10. In other areas of international law, references to the concept of general principles of law were also unclear and inconsistent. For instance, the choice of law provisions in arbitral

---

Law 104; according to Lauterpacht, in his report on the law of treaties, the nullity of a treaty could result from its "inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or of aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those *principles of law generally recognized by civilized nations*." (emphasis added) see Report on the Law of Treaties by Sir Hersch Lauterpacht, Special Rapporteur, A/CN.4/63, Yearbook of the International Law Commission, vol. II, 1953, p. 155.

[15] The United Nations Conference on International Organizations (UNCIO), Documents, vol. XIV, 167.

[16] Ibid, 164.

[17] V. D. Degan, 52; G. Gaja, "General Principles of Law" (2013) Max Planck Encyclopedia of Public International Law 2.

[18] G I Tunkin, "'General Principles of Law' in International Law' in M René et. al., *internationale Festschrift für Alfred Verdross: zum 80. Geburtstag* (Fink München 1971) 525; see also Antônio Augusto Cançado Trindade, *The Construction of a Humanized International Law* (Brill Nijhoff, 2014) 870.

[19] Ibid, Tunkin, 526.

[20] Rome Statute of the International Criminal Court (17 July 1998) Article 21.

[21] Alain Pellet, 'Applicable Law' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary* (OUP, 2002) vol. II 1071-1076.

[22] *Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1-T, T. Ch. II, 10 December 1998, para. 177; *Prosecutor v. Kupreskic et al*, Judgment, Case No. IT-95-16-T, T Ch. II, 14 January 2000, para. 591 (In this case, The Trial Chamber of the ICYT held that when the Statute could not resolve the issue in question, the Tribunal should draw upon "(i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice".)

cases *LIAMCO v. Libya* and *Texaco v. Libya* read: "[t]his Concession shall be governed and interpreted in accordance with the principles of law of Libya common to *principles of international law*, and in the absence of such common principles then by and in accordance with the *general principles of law as may have been applied by international tribunals*" (emphasis added).[23] And it has been observed that the Iran-US Claims Tribunal has frequently referred to "general principles of international law", leaving doubt as to whether it was indicating customary international law or "general principles of law recognized by civilized nations".[24]

11. To sum up, given the unresolved doctrinal controversies surrounding this concept, a commonly agreed understanding of general principles of law, as well as its relationship with other related concepts like "general principles of international law" and "fundamental principles", is lacking. In particular, questions remain as to whether they are limited to those recognized *in foro domestico* or could also be derived from an international origin, and whether general principles of law could be generated in an ethical discourse. These questions are reflected in the jurisprudence of international courts and tribunals.

3. Application of general principles of law

12. Despite doctrinal uncertainties, international courts and tribunals have generally recognized general principles of law as an autonomous source of international law and have applied it in practice. Although the PCIJ and the ICJ have been cautious to apply this source in an explicit manner,[25] general principles of law have played a greater role in areas of international law that involve non-State actors, e.g. international criminal law and international investment law.[26]

13. The PCIJ has referred to general principles, explicitly or implicitly, on *ejus est interpretare legem cujus condere*,[27] *nemo judex in re sua*,[28] *restitution in integrum*,[29] *estoppel*[30] and *competence-competence*.[31] Examples of the reference to general principles of law by the ICJ include *res judicata*,[32] equality of parties,[33] *pacta sunt servanda*.[34] These are examples of general principles of law that commonly exist in almost all existing legal systems.

14. Furthermore, it appears that the courts did not understand that general principles of law were limited to those derived from domestic law. For instance, the PCIJ has invoked

---

[23] *Libyan American Oil Company v. Government of Libyan Arab Republic* 20 I.L.M. (1981) 33; *Texaco Overseas Petroleum Company v. Government of Libyan Arab Republic* (Jan. 19, 1977), 17 I.L.M. 3 (1978) 14.

[24] Grant Hanessian, '"Principles of Law" in the Iran-US Claims Tribunal' (1989) Columbia Journal of Transnational Law 323, referring to *R.J. Reynolds Tobacco Co. v. Gov't of the Islamic Republic of Iran*, Award No. 145-35-3 (July 31, 1984), 7 Iran-U.S. C.T.R. 181, 191; *Iranian Customs Admin. v. United States*, Award No. 105-B-16-1 (Jan. 18, 1984), 5 Iran-U.S. C.T.R. 94, 95, 99; *Flexi-Van Leasing, Inc. v. Islamic Republic of Iran*, order filed Dec. 20, 1982, 1 Iran-U.S. C.T.R. 455, 457-58.; *ARCO Iran, Inc. v. Gov't of the Islamic Republic of Iran*, Award No. 311-74/76/81/150-3 (July 14, 1987), 16 Iran-U.S. C.T.R, (The Tribunal applied "general principles of commercial and international law" for contractual issues), 27-28.

[25] Giorgio Gaja, 6.

[26] N. Wühler, 'Application of General Principles' (1996) ICCA Congress Series no. 7, 553.

[27] *Question of Jaworzyna*, Advisory Opinion, PCIJ Series B, No. 8, 37.

[28] *Interpretation of Article 3, Paragraph 2, of the Treaty of Lausanne*, Advisory Opinion, PCIJ Series B, No. 12, 32.

[29] *Chorzow Factory* case, PCIJ Series A, No. 9, 30.

[30] Ibid, 31; *Legal Status of Eastern Greenland* case, PCIJ Series A/B, No. 53, 69.

[31] *Interpretation of Greco-Turkish Agreement*, Advisory Opinion, PCIJ Series B, No. 16, 20.

[32] *Case Concerning the UN Administrative Tribunal*, Advisory Opinion, ICJ Reports 1954, 53.

[33] *Judgments of the Administrative Tribunal of the ILO upon complaints made against the UNESCO*, Advisory Opinion, ICJ Reports 1956, 85; *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Report 1973, 181; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Judgment, ICJ Reports 2007, para. 114.

[34] *Nuclear Tests (Australia v. France)* case, ICJ Reports 1974, 268.

the "principle universally accepted by international tribunals and likewise laid down in many conventions",[35] "principle generally accepted in the jurisprudence of arbitration, as well as by municipal courts",[36] "a principle of international law and even a general concept of law".[37] The ICJ has referred to "the principles underlying the [Genocide] Convention" as "principles which are recognized by civilized nations as binding on States".[38] In the *Nicaragua* case, the Court referred to "fundamental general principles of humanitarian law".[39] In *East Timor* case, the Court referred to the principle of self-determination of peoples as "one of the essential principles of contemporary international law".[40] It has not been clear whether the principles referred to in these cases are general principles within the meaning of Article 38(1)(c).[41] Additionally, other views on general principles of law have been expressed in dissenting and separate opinions of ICJ cases.[42]

15. International criminal courts and tribunals have made more references to general principles of law. General principles of law could play a decisive role on critical issues.[43] General principles of law have been frequently resorted to on substantive as well as procedural issues. On substantive law, the principle of duress as a mitigating factor in sentencing,[44] the principle of proportionality in sentencing,[45] *nulla poena sine lege*,[46] the principle that the establishment of criminal culpability requires an analysis of the objective and subjective elements of the crime[47] have been invoked. In terms of procedural rules,

---

[35] *Electricity Company of Sofia and Bulgaria*, PCIJ Series A/B, No. 79, 199 (on the principle that the parties to a case must abstain from any measures that may prejudice the execution of the decision to be given and must not take any step that may aggravate the dispute.)

[36] *Factory of Chorzow* (Jurisdiction) PCIJ Series A, No. 9, 31 (on the obligation of reparation).

[37] *Factory of Chorzow* (Merits) case, PCIJ Series A. No. 17, 29.

[38] *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, 23.

[39] *Military and Paramilitary Activities in and against Nicaragua*, Merits, I.C.J. Reports 1986, pp. 113-115, 129-130, paras. 218, 220 and 255.

[40] *East Timor (Portugal v. Australia)* case, Judgment, I.C.J. Reports 1995, p. 201, para. 29.

[41] Some didn't see them as general principles of law while others maintained that these principles are covered by Article 38(1)(c) of the ICJ Statute. See e.g., Brian D. Lepard, 'The Relationship between Customary International Law and General Principles of Law' in B. D. Lepard. *Customary International Law: A New Theory with Practical Applications* (2010 CUP) 162; B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles of Law' (1989) 12 Australian Yearbook of International Law 82; *South West Africa* Case, Second Phase, I.C.J. Reports 1966, dissenting opinion of Judge Tanaka; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (1989 OUP) 97 and 134.

[42] For instance, according to Judge Tanaka in his dissenting opinion in the *South West Africa* case, "…it is undeniable that in Article 38, paragraph 1(c), some natural law elements are inherent. It extends the concept of the sources of international law beyond the limit of legal positivism, according to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of States. But this point of view we believe, was clearly overruled by Article 38, paragraph 1(c)", see *South West Africa* Case, Second Phase, I.C.J. Reports 1966, dissenting opinion of Judge Tanaka, 298; Similarly, Judge Cançado Trindade maintained in his separate opinion in *Pulp Mills* case that "general principles of law, in the light of natural law (preceding historically positive law), touch on the origins and foundations of international law, guide the interpretation and application of its rules, and points towards its universal dimension". And by contending that "there is no reason not recourse to general principles of law as recognized in domestic as well as international law", he claimed that the principle of prevention and the precautionary principle, which were embodied in international instruments like the Stockholm Declaration and the Rio Declaration, are general principles of law. See *Pulp Mills on the River Uruguay* case, I.C.J. Reports 2010, separate opinion of Judge Cançado Trindade.

[43] F. O. Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill/Nijhoff, 2008) 77-164.

[44] *Prosecutor v. Erdemovic*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, App. Ch., 7 October 1997, para. 40, 55-72.

[45] *Prosecutor v. Bakid*, Judgment, Case No. IT-95-14-T, T. Ch. I, 3 March 2000, para. 796.

[46] *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T, T. Ch. II, 16 November 1998, para. 402.

[47] Ibid, para. 425.

principles on the burden of proof,[48] that an accused should not be tried in his absence,[49] and *non bis in idem*[50] have been resorted to.

16. In the field of international investment law, it has been observed that general principles of law played a "prominent role".[51] General principles of law invoked by international investment tribunals include: compensation includes *damnum emergens* and *lucrum cessans*,[52] good faith,[53] *res judicata*,[54] *competence-competence*,[55] claimant has the burden of proof,[56] unjust enrichment,[57] parties cannot take legal advantage of its own fault.[58] A decisive role could be played by general principles of law in investment arbitration. For instance, the award of *Klöckner v. Cameroon* was annulled by the *ad hoc* committee for the Tribunal's failure to provide sufficient evidence to support the existence of a general principle.[59] In interpreting the concept of "fair and equitable treatment", investment

---

[48] Ibid, paras. 599-604.

[49] *Prosecutor v. Sesay el al.*, Ruling on the Issue of the Refusal of the Third Accused, Augustine Gbao, to Attend Hearing of the Special Court for Sierra Leone on 7July 2004 and Succeeding Days, Case No. SCSL- 04-15-T, T Ch., 12 July 2004, para. 10.

[50] *Prosecutor v. Tadić*, Decision on the Defence Motion on the Principle of *Non Bis in Idem*, Case No. IT-94-1-T, T. Ch. II, 14 November 1995, paras. 2-4.

[51] C. Schreuer, *The ICSID Convention: A Commentary* (CUP 2004) 94; See also Tarcisio Gazzini, 'General Principles of Law in the Field of Foreign Investment' (2009) 10 Journal of World Investment and Trade, 103; A. McNair, 'General Principles of Law Recognized by Civilized Nations' (1957) 33 BYIL 15 (It was suggested that general principles of law "will prove fruitful in the application and interpretation of [State] contracts which, though not interstate contracts and therefore not governed by public international law *strictu sensu*, can more effectively be regulated by general principles of law than the special rules of any single territorial system".)

[52] *Amco Asian Corporation and Others v. Indonesia*, ICSID ARB/81/1, Award of November 20, 1984, 89 ILR (1992) 405, p. 504.

[53] *Terniras Medioambientales Tecmed, S.A. v. Mexico*, ICSID ARB(AF)/00/2, Award, 29 May 2003, para. 153; *Canfor Corporation v. United States, Terminal Forest Products Ltd. v. United States* (Consolidated NAFTA / UNCITRAL), Preliminary Question, 6 June 2006, para. 182; *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 297.

[54] *Waste Management v. Mexico (II)*, ICSID ARB(AF)/00/3, Jurisdiction, 26 June 2002, paras. 39 and 43, the Tribunal held that "There is no doubt that *res judicata* is a *principle of international law*, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of justice. Indeed both parties accepted this." (emphasis added)

[55] *Sociedad Anonima Eduardo Vieira v. Chile*, ICSID ARB/04/7, Award, 21 August 2007, para. 203.

[56] *Salini Costruttori S.p.A. and Italstrade S.p.A v. The Hashemite Kingdom of Jordan*, ICSID ARB/02/13, Award, 31 January 2006, para. 70, the Tribunal held that '[i]t is a well established principle of law that it is for a claimant to prove the facts on which it relies in support of his claim'. See also *Asian Agricultural Products Limited v. Sri Lanka*, ICSID ARB/87/3, Award, 27 June 1990 603, para. 56; *Autopista Concesionada de Venezuela, C.A. v. Venezuela*, ICSID ARB/00/5, Award, 23 September 2003, para. 110; *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Award, 26 January 2006, para. 95.

[57] *Sea-Land Services Inc v. Iran*, 6 Iran US Cl. Trib. Rep. (1984) 149, p. 168, the Tribunal held that '[t]he concept of unjust enrichment had its origins in Roman law [...] It is codified or judicially recognized in the great majority of the municipal legal systems of the world, and is widely accepted as having been assimilated into the category of general principles of law available to be applied by international tribunals'. More recently, in *Saluka Investments BV (Netherlands) v. Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para. 449, the Tribunal pointed out that '[t]he concept of unjust enrichment is recognized as a *general principle of international law*. It gives one party a right of restitution of anything of value that has been taken or received by the other party without a legal justification'. (emphasis added)

[58] *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 353.

[59] *Klöckner Industrie-Anlagen GmbH and others v. Cameroon*, ICSiD Case No. ARB/81/2, Decision on Annulment, 3 May 1985, 243.

tribunals have resorted to principles including good faith,[60] due process,[61] proportionality,[62] and others.[63]

17. In the Iran-US Claims Tribunal, it has been observed that general principles of law were resorted to in order to avoid the choice among the laws of Iran, the US or a third country.[64] It was also observed that the Tribunal has applied "general principles of law" in cases where application of the otherwise governing national law would have resulted in an unfair outcome.[65] Furthermore, the Tribunal did not distinguish its function in public international law and private law, and appeared to have applied "general principles of law" in both of them.[66]

18. Despite a significant number of references to general principles of law in different areas of international law, the methodology of identifying general principles of law remains unclear. There are criticisms that international courts and tribunals applied "general principles" that are not generally recognized.[67] It has also been pointed out that by limiting general principles of law to those generally recognized in worldwide municipal laws, difficulties could arise when a court or a tribunal has to deal with a question where no widely accepted principle could be identified.[68] In this regard, crucial questions remain unresolved, which have caused legal uncertainty and threatened fair administration of justice. Such questions include the criteria to decide whether a principle is "generally recognized", the scope of comparative research when deriving general principles from municipal laws, how to categorize legal families and systems when conducting such analysis, how to select representative national laws and whether and how to adapt such principles to international application when conducting analogies.

4. Scope of the topic and legal questions to be addressed

19. Within the background elaborated above, the Commission could clarify the nature, scope and method of identification of general principles of law as they have been used by States, by international courts and tribunals, and by international organizations and bodies.

---

[60] *Sempra Energy International v. Argentina*, ICSID ARB/02/16, Award, 28 September 2007, para. 298.

[61] *Waste Management Inc. v. Mexico*, para. 98.

[62] *MTD Equity Sdn. Bhd and MTD Chile S.A v. Chile*, ICSID ARB/01/7, Award, 25 May 2004, para 109.

[63] See Tarcisio Gazzini, 118.

[64] *American Bell Int'l, Inc. v. Islamic Republic of Iran*, 9 Iran-U.S. C.T.R. 107 Award No. 255-48-3 (Sept. 19, 1986), 12 Iran-U.S. C.T.R. 170; *Questech, Inc. v. Ministry of National Defense of the Islamic Republic of Iran*, Award No. 191-59-1 (Sept. 25, 1985), (applying the general principle of changed circumstances despite a contract clause choosing Iranian law); *Aeronutronic Overseas Servs., Inc. v. Government of the Islamic Republic of Iran*, Award No. ITM 44-158-1 (Aug. 24, 1984), 7 Iran-U.S. C.T.R. 217; *Gould Mktg., Inc. v. Ministry of Defense of the Islamic Republic of Iran*, Award No. 136-49/50-2 (June 22, 1984), 6 Iran-U.S. C.T.R. 272, 274 (A contract for sale of communications equipment provided for application of California law. The Tribunal stated that "American law" contained "the general principle" that where a contract is terminated for frustration "amounts due under the contract are to be proportioned to the extent the contract was performed." The Tribunal also cited English law and noted that "[a] similar rule exists in civil law." Id. at 274 n. 1. The Tribunal also applied "general principles" of bailment law, to require that the claimant make available to the respondent certain equipment held by the claimant for the respondent. Id. at 279. See also *Morgan Equip. Co. v. Islamic Republic of Iran*, Award No. 100-28-2 (Dec. 27, 1983), 4 Iran-U.S. C.T.R. 272 (Tribunal rejected claimant's argument that it was entitled to recover under the law of Idaho as a third party beneficiary under certain purchase orders governed by Idaho law); *R.J. Reynolds Tobacco Co. v. Gov't of the Islamic Republic of Iran*, Award No. 145-35-3 (July 31, 1984), 7 Iran-U.S. C.T.R. 181.

[65] *CMI International, Inc. v. Ministry of Roads and Transportation and Islamic Republic of Iran*, Award No. 99-245-2 (Dec. 27, 1983), 4 Iran-U.S. C.T.R; See also Grant Hanessian, 329-330.

[66] Grant Hanessian, 350.

[67] F. O. Raimondo, 88; see also G. I. Tunkin, *Theory of International Law* (HUP 1974) 190 (Warning against the desire to use 'general principles of law' in order to proclaim principles of certain legal systems to be binding upon all).

[68] Michael Akehurst, 'Equity and General Principles of Law' (1976) 25(4) International and Comparative Law Quarterly 825.

Without excluding other questions or aspects related to this topic, the Commission could, in particular, analyze:

(i) The nature and scope of general principles of law;

(a) Scope and terminology with regard to general principles of law, particularly its relationship with concepts such as "general principles of law recognized by civilized nations", "general principles of international law" and "fundamental principles of law";

(b) The nature and origins of general principles of law;

(c) General principles of law as an autonomous source independent from treaties and customary international law;

(d) The functions of general principles of law;

(ii) The relationship of general principles of law with the other two principal sources of international law: i.e. treaties and customary international law; and

(iii) Methods of identification of general principles of law;

(iv) Other issues.[69]

20. The Commission may refer to a number of examples of general principles of law throughout the consideration of the topic, and may include them in the commentaries to the conclusions that would be adopted.

(i) The Nature and scope of general principles of law

21. It will be important that the Commission firstly analyze and clarify the definition of "general principles of law", in order to delimit the scope of the topic. It is suggested that "general principles of law recognized by civilized nations" under the Article 38 of the Statute of the PCIJ and the Statute of the ICJ should be the main focus of this study, and the definition of "general principles of law" should also be analyzed in the light of its relationship with other concepts such as "general principles of international law", "fundamental principles" and "equitable principles".

22. The nature and characteristics of general principles of law could be examined in the light of the historical development of this concept, and explicit as well as implicit references to general principles of law in international legal practice. For instance, the Commission could examine early arbitral decisions and treaties in which general principles of law were recognized as a source of international law; and the context and debates leading up to the inclusion of "general principles of law recognized by civilized nations" in the PCIJ Statute and later in the ICJ Statute. References to this concept, as well as related concepts, in treaties, jurisprudence of courts and tribunals, domestic legislations and international instruments, could also be examined.

23. One related, and also important issue is the origin of general principles of law. The Commission should examine whether general principles of law could only derive from the generality of municipal laws of States, or general principles could also derive from other origins, which are recognized by States, such as the international legal system and international relations.

24. The place of general principles of law within the international legal system should also be clarified. Particularly, general principles of law as an autonomous source of international law, and its relationship with treaties as well as customary international law should be assessed.

---

[69] Such as the possibility that general principles of law may also be a source of particular international law. For instance, it has been observed that the Court of Justice of the European Communities usually confines itself to examining the laws of the member States in order to derive general principles of law for the regional regime. See Michael Akehurst, 'Equity and General Principles of Law' (1976) 25(4) International and Comparative Law Quarterly 821, citing *X v. Council* [1972] 18 Recueil 1205; *Advocate-General Warner in Commission v. Council* [1973] E.C.R. 575, 593; *Werhahn v. Council* [1973] E.C.R. 1229, 1259-1260; *Slander v. Ulm* [1969] Recueil 419, 425.

25. The functions of general principles of law should also be examined. As mentioned above, the major function of general principles of law have been understood by some scholars as "filling-in the gaps" in international law, when no treaty provision or rule of customary international law could be found.[70] Others have attributed a broader role to general principles of law as informing and underlying the system of international law and providing guidance for the interpretation and application of treaties and customs.[71] The Commission could study how have general principles of law, over time, undertaken different roles and functions contributing to the development of the international legal system, as well as specialized regimes of international law.

26. Particularly, the Commission could also consider the rationale behind, and the essential functions played by general principles of law when they are applied by international courts and tribunals and international bodies, and when they are resorted to by States in international relations and by national courts in their domestic jurisprudence.

27. A related aspect is about general principles of law as a source of legal rights and obligations. In particular, the Commission could study the areas in which general principles of law regulate the conduct of the members of the international community by providing substantive and procedural rules (e.g., principles of good faith or *non bis in idem*).

(ii) The relationship of general principles of law with treaties and customary international law

28. As was reflected in the international jurisprudence referred to above, general principles of law have been recognized as one of the principal sources of international law, and as a source independent from treaties and customary international law. However, general principles of law may interrelate with the other two principal sources of international law, treaties and customary international law. The relationship and interactions of general principles of law and treaties as well as customary rules should be studied. For instance, it could study how general principles of law and treaties as well as customary rules contribute to the creation and development of each other, the possible function of general principles of law to assist and provide guidance for the application and interpretation of treaties and customary international law, and the possibility of parallel existence of general principles of law with corresponding rules in treaties and customary international law.

(iii) Methods of identification of general principles of law

29. A question of critical importance is the method of identification of general principles of law. For general principles derived from municipal law common to worldwide legal systems, the Commission should study questions including the criteria for determining the common recognition of a principle in worldwide legal systems; the method to derive general principles of law and, e.g., if comparative analysis is needed, the breadth and depth of the comparative research, the categorization of legal families or legal systems in conducting comparative analysis, whether and how to adapt principles originated from domestic laws to the international legal system. If the study in the above section demonstrates that general principles of law could also derive from the international legal system, as recognized by States, the Commission should also help clarify the criteria and methods to identify general principles of law from these sources, such as treaties, non-binding international instruments, judicial decisions of international courts and tribunals, etc.

(iv) Other issues

30. It has been observed that although international judicial bodies with general jurisdiction have taken care to derive general principles from worldwide legal systems, regional judicial bodies have occasionally limited their scope of comparative research to

---

[70] Vladimir-Djuro Degan, *A Source of General International Law* (Martinus Nijhoff 1997) 40-41.

[71] Antônio Augusto Cançado Trindade, *The Construction of a Humanized International Law* (Brill Nijhoff, 2014) 870; C. W. Jenks, *The Common Law of Mankind* (Stevens, 1958) 106.

domestic laws of its member States.[72] Within this context, the Commission could examine the existence and legal status of such principles of law, and provide clarification and guidance in this regard.

5. Method of work of the Commission on this topic

31. This study will primarily be based on the practice of States, treaties and their drafting histories, other international instruments, judicial decisions of international, regional as well as national courts and tribunals, and national legislation.

32. The views and analysis of scholars will also be consulted and assessed in the light of international practice.

6. The topic meets the requirement for selection of a new topic

33. The topic of "General Principles of Law" meets the requirements for selection of new topics set by the Commission because it reflects the needs of the international community in relation to the progressive development and codification of international law. In particular, this source of international law has been used for more than a century, and continues to be relied upon, but its nature, scope, origins, criteria and methods of identification remain unclear.

34. The Secretariat of the Commission produced a report on 31 March 2016 on the *Possible Topics for Consideration Taking into Account the Review of the List of Topics Established in 1996 in the Light of Subsequent Developments* (A/CN.4679/Add.1). The Secretariat listed the topic "General principles of law" as the first out of six topics. General principles of law would be considered by the Commission for the first time in depth as a source of international law.

35. Given the abundance of relevant State practice and application of this source of international law by different courts and tribunals, as well as its long history of doctrinal development, the work of the International Law Commission on this topic will be concrete and feasible and could provide clarity and guidance on the understanding, identification and application of this source of law.

36. Based on the foregoing, the conclusions and commentaries envisaged as a result of the consideration of the topic of "General Principles of Law" by the Commission will be useful for States, international organizations, international courts and tribunals, as well as scholars and practitioners of international law.

7. Selected bibliography

Scholarly Work

Acosta Alvarado, P.A., *Los principios generales del derecho y las normas tipo principio Su conceptualización y uso en el ordenamiento internacional*, 25 Rev. Derecho del Estado 193 (2010)

Akehurst, M., *Equity and General Principles of Law*, 25 Int'l & Comp. L.Q. 4 (1976)

Akehurst, M., *Note: The Hierarchy of the Sources of International Law*, 47 B.Y. Int'l L. 273 (1977)

Alpa, G., *General Principles of Law*, 1 Ann. Surv. Int'l & Comp. L. 1 (1994)

Alston, P., & Simma, B., *The Sources of Human Rights Law: Custom,* Jus Cogens *and General Principles*, 12 Austrian Y.B. Int'l L. 82 (1988-1989)

---

[72] Michael Akehurst, 818-825; See also *Procureur de la Republique v. Association de defense des bruteurs d'huiles usages* (ADBHU), Case 240/83, para. 9: "the principles of freedom of movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are *general principles of Community law* of which the Court ensures observance" (emphasis added); *Stauder v City of Ulm*, Case 26/69 [1969] ECR 419, para. 7: "fundamental human rights [are] enshrined in *the general principles of Community law* and protected by the Court" (emphasis added)

Anzilotti, *Corso di Diritto Internazionale*, 3rd ed. (Cedam—Padova, 1955)

Bassiouni, M. C., *A Functional Approach to General Principles of International Law*, 11 Mich. J. Int'l L. 768 (1989-1990)

Becker Lorca, A., *International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 Harvard International Law Journal 283 (2006)

Brownlie, I., *Some Questions Concerning the Applicable Law in International Tribunals, in: Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Jerzy Makarczyk ed., 1996)

Bonafé, Beatrice I., Palchetti, P., *"Relying on general principles in international law"*, in *Research Handbook on the "Theory and Practice of International Lawmaking"*, 160 (E. Elgar, 2016)

Byers, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law* (CUP, 1999)

Charney, J. I., *International Lawmaking — Article 38 of the ICJ Statute Reconsidered*, in: *New Trends in International Lawmaking — International 'Legislation' in the Public Interest: Proceedings of an International Symposium of the Kiel Walter-Schücking-Institute of International law March 6 to 8, 1996* (Jost Delbrück ed., 1997)

Charney, J. I., *Universal International Law*, 87 Am. J. Int'l L. 529 (1993)

Cheng, B., *General Principles of Law as Applied by International Courts and Tribunals* (Stevens & Sons Limited, 1953)

Chiu, H., *Chinese View on the Sources of International Law*, 28 Harvard International Law Journal 289 (1987)

Cooke Gutteridge, H., *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research* (CUP 2nd ed., 1949)

Crawford, J. F., *Responsibility of the International Community as a Whole*, 8 Indiana J. Global Legal Studies 303 (2001)

D'Aspremont, J., *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2011)

de Vattel, E., *The Law of Nations, Or, Principles of the Law of Nature Applies to the Conduct of Affairs of Nations and Sovereigns, with Three Early Essays on the Origins and Nature of Natural Law and on Luxury* (Liberty Fund, 2008)

Degan, V. D., *General Principles of Law (A Source of General International Law)*, 3 Finnish Y.B. Int'l L. 1 (1992)

de Wet, E., *Judicial Review as an Emerging General Principe of Law and its Implications for the International Court of Justice*, Netherlands Int'l L. Rev. 47 (2000)

Diez de Velasco, M., *Instituciones de Derecho Internacional Publico* (Ed. Tecnos, 2013)

do Nascimento e Silva, G. E., *The Widening Scope of International Law, in* Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski 412 (Jerzy Makarczyk ed., 1996)

Dordeska, M., *The Process of International Law-Making: The Evolution of General Principles of Law Recognized by Civilized Nations Through the Jurisprudence of International Courts and Tribunals* (doctoral dissertation, The George Washington University Law School, August 2016)

Fitzmaurice, G., *Some Problems Regarding the Formal Sources of International Law*, Symbolae Verzijl 153 (1958)

Fitzmaurice, G., *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, in Recueil Des Cours 092 (1957)

Fitzmaurice, G., *The Law and Procedure of the International Court of Justice, 1951-54 General Principles and Sources of Law*, 30 B.Y. Int'l L. 1 (1953)

Ford, C. A., *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 5 Duke J. Comp & Int'l L. 35 (1994)

Freeman Jalet, F. T., *The Quest for the General Principles of Law Recognized by Civilized Nations — A Study*, 10 UCLA L. Rev. 1041 (1962-1963)

Friedmann, W., *The Uses of "General Principles" in the Development of International Law*, 57 Am. J. Int'l L. 2 (1963)

Gaja, G., *General Principles of Law*, Max Planck Encyclopedia of Public International Law (OUP, 2013)

Pineschi, L. (ed.), *General Principles of Law: The Role of the Judiciary* (Springer, 2015)

Gonidec, P. F., *Existe-t-il un Droit International Africain?*, 5 African Journal of International and Comparative Law 243 (1993)

Guillame, G., *The Future of International Judicial Institutions*, 44 Int'l & Comp. L. Q. 848 (1995)

Hathaway, O. A., *Between Power and Principle: An Integrated Theory of International Law*, 72 Univ. Chicago L. Rev. 469 (2005)

Herczeg, G., *General Principles of Law and the International Legal Order*, 5 Hungarian Academy of Sciences (1969)

Higgins, R., *Problems and process: International Law and How We Use It* (OUP, 1995)

Hudson, M. O., *The Permanent Court of International Justice, 1920-1942* (The Macmillian Company, 1943)

Jahel, S., "*Les principes généraux du droit dans les systèmes arabo-musulmans au regard de la technique juridique contemporaine*", Rev. intle. de droit comparé, Vol. 55 N°1, 105 (2003)

Jain, N., *Judicial Lawmaking and General Principles of Law in International Criminal Law*, 57 Harv. Int'l L.J. 111 (2016)

Jenks, C. W., *The Conflict of the Law-Making Treaties*, 30 B.Y. Int'l L 401 (1953)

Jenks, C. W., *The Scope of International Law*, 31 B.Y. Int'l L. 1 (1954)

Jennings, R. *The Internal Judicial Practice of the International Court of Justice*, 59 B.Y. Int'l L 31 (1988)

Jennings, R., *International Lawyers and the Progressive Development of International Law*, in: *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Jerzy Makarczyk ed., 1996)

Jennings, R., *The Progress of International Law*, 34 B.Y. Int'l L 334 (1958)

Jessup, P. C., *The Reality of International Law*, 18 Foreign Affairs 244 (1940)

Jiménez de Aréchaga, E. "*Curso de Derecho Internacional Público*", Centro Estudiantes de Derecho (1959)

Kamto, M., *La volonté de l'État en droit international*, (Martinus Nijhoff, 2007)

Kelsen, H., & Tucker, R. W., *Principles of International Law*, (Holt, Rinehart & Winston, 2nd ed., 1927)

Kooijmans, P. H., *Some Thoughts on the Relation between Extra-Legal Agreements and the Law-creating Process*, in Makarczyk J. (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Martinus Nijhoff, 1996) 507

Koskenniemi, M., *The Functions of Law in the International Community*, 79 B.Y. Int'l L 353 (2008)

Koskenniemi, M., *Sources of International Law* (Ashgate, 2000)

Kotuby Jr., C. T. et al., General Principles of Law and International Due Process (OUP 2017)

Leathley, C., *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the International Law Commission Missed an Opportunity?*, 40 N.Y.U.J. Int'l L & Pol. 259 (2007)

Lauterpacht, E., *The Judicial and the Meta-Judicial in International law*, in Makarczyk J. (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski* (Martinus Nijhoff, 1996) 215

Lauterpacht, H., *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration* (Archon Books, 1927)

Lauterpacht, H., *The Development of International Law by the International Court* (Praeger, 1958)

McDougal, M. S., & Feliciano, F. P., *International Coercion and World Public Order: The General Principles of the Law of War*, 67 Yale L. J. 5 (1958)

McNair, A., *The General Principles of Law recognized by Civilized Nations*, 33 B.Y. Int'l L. 33 (1957)

O'Keefe, R., *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 Int'l & Comp.L.Q 189 (2004)

Pellet, A., *Article 38, in: The Statute of the International Court of Justice, A Commentary* (*Zimmermann* & et al. eds., 2012)

Pellet, A., *Principes Generaux de Droit En Droit International*, These pour le doctorat (9 February 1974)

Perreau-Saussine, A., *Lauterpacht and Vattel on the Sources of International Law: The Place of Private Law Analogies and General Principles*, in Chetail, V., and Haggenmacher, P., (eds) *Vattel's International Law in a XXIst Century Perspective* (Martinus Nijhoff, 2011)

Peters, A., *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, in Self-Determination and Secession in International Law (OUP, 2014)

Raimondo, F. O., *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill/Nijhoff, 2008)

Rao, P. S., *The Concept of International Community in International Law: Theory and Practice, in: International Law between Universalism and Fragmentation, Festschrift in honour of Gerhard Hafner*, 85 (Brill, 2008)

Raz, J., *Legal Principles and the Limits of Law*, 81 Yale *L. J. 5 (1972)*

Reinoso Barbero, F., coordinador, "*Principios Generales del Derecho: Antecedentes Históricos y Horizonte Actual*", (Thompson Reuters Arazandi, 2014)

Rosenne, S., *Codification Revisited After 50 Years*, 2 Max Planck Y. of UN L. 1 (1998)

Rosenne, S., *Note:* Res judicata: *Some Recent decisions of the International Court of Justice*, 28 B.Y. Int'l L 365 (1951)

Sandifer, D. V., *Evidence Before International Tribunals* (The Foundation Press, Inc., 1939)

Schachter, O., *International Law in Theory and Practice* (Martin Nijhoff, 1991)

Schlesinger, R. B., *Research on the General Principles of Law Recognized by Civilized Nations*, 51 Am. J. Int'l L. 4 (1957)

Shahabuddeen, M., *Precedent in the World Court* (CUP, 2007)

Simma, B. *Universality of International Law from the Perspective of a Practitioner*, 20 E. J. Int'l L. 265 (2009)

Stone, J., *Non-Liquet and the Function of the Law in the International Community*, 35 B.Y.I.L 124 (1959)

Stuyt, A., *The General Principles of Law: As Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (Martinus Nijhoff, 1946)

Thirlway, H., *The Sources of International Law* (OUP, 2014)

Tunkin, G. I., *Is General International Law Customary Law Only?*, 4 Eur. J. Int'l L. 534 (1993)

Tunkin, G. I., *Theory of International Law* (George Allen & Unwin Ltd., 1974)

Van Hoof, G. J. H., *Rethinking the Sources of International Law* (Brill, 1983)

Villiger, M. E., *Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources* (Martinus Nijhoff 1985)

Watts, A., *The International Court and the Continued Customary International Law of Treaties*, in Judge Shigeru Oda: Liber Amicorum (Nisuke Andão, Edward McWhinney & Rüdiger Wolfrum eds., 2002)

Wolfke, K., *Some Reflections on Kinds of Rules and International Law-Making by Practice*, in Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski 587 (Jerzy Makarczyk ed., 1996)

Wolfrum, R., "General International Law (Principles, Rules, and Standards) Max Planck Encyclopedia of Public International Law" (OUP 2013)

Yakemtchouk, R., *L'Afrique en Droit International*, (Libraire Generale De Droite et De Jurisprudence, 1971)

Yee, S., *Article 38 of the ICJ Statute and Applicable Law: Selected Issues in Recent Cases*, 7 J. Int'l Dispute Settlement (2016)

Zimnenko, B. L., *International Law and the Russian Legal System*, (Eleven, 2007)

Int'l L. Assoc., *Study Group on the Use of Domestic Law Principles for the Development of International Law*, Working session 2016 (Aug.10), available at: http://www.ila-hq.org/index.php/study-groups

Int'l L. Assoc., *Study Group on the Use of Domestic Law Principles for the Development of International Law*, Working session 2014 (April 8), available at: http://www.ila-hq.org/index.php/study-groups

Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes, Permanent Court of International Justice

Selected Jurisprudence in International Courts and Tribunals

1. Permanent Court of International Justice

"*Lotus*", Judgment, 1927 P.C.I.J. (ser.A) No.10 (Sept.7)

Certain German Interests in Polish Upper Silesia (Merits), Judgment, 1926 P.C.I.J. (ser.A) No.7 (May 25)

Factory at Chorzów (Indemnities), Judgment, 1927 P.C.I.J. (ser.A) No.12 (Nov.21)

Factory at Chorzów (Jurisdiction), Judgment, 1927 P.C.I.J. (ser.A) No.9 (July 26)

Factory at Chorzów (Merits), Judgment, 1928 P.C.I.J. (ser.A) No.17 (Sept.13)

Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928 P.C.I.J. (ser.B) No.16 (Aug.28)

Mavrommatis Palestine Concession, Judgment, 1924 P.C.I.J. (ser.A), No. 2 (Aug.30)

Panevezys-Saldutiskis Railway, Judgment, 1939 P.C.I.J. (ser.A/B) No.76 (Feb.28)

Polish Postal Service in Danzig, Advisory Opinion, 1925 P.C.I.J. (ser.B) No.11 (May 16)

Question on Jaworzina, Advisory Opinion, 1923 P.C.I.J. (ser.B) No.8 (Dec.6)

2. International Court of Justice

Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, 2012 I.C.J. 324 (June 19)

Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunis. v. Libya), Judgment, 1985 I.C.J. 192 (Dec.10)

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. (Feb.3); General List No.118

Avena and Other Mexican Nationals (Mex v. U.S.), Judgment, 2004 I.C.J. 12 (Mar.31)

Corfu Channel (U.K. v. Alb.), Compensation, 1949 I.C.J. 15 (Dec.15)

Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory opinion, 1954 I.C.J. 47 (July 13)

Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), Judgment, 1989 I.C.J. 15 (July 20)

Monetary Gold Removed from Rome in 1943 (Italy v. Fr., U.K. and U.S.), Preliminary objections, 1954 I.C.J. 19 (June 15)

South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6 (July 18)

Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6 (June 15)

3. Inter-State Arbitration

Antoine Fabiani Case (*France v. Venezuela*), RIAA X, 83–139, 1891

Delagoa Bay Railway Arbitration (*UK/USA v. Portugal*), 1900

Lena Goldfields Case (*Lena Goldfields, Ltd. v. the Soviet Government*), 5 ILR 427, 1930

Naulilaa Arbitration (*Portugal v. Germany*), 4 ILR 467, 1928

The Pious Fund Case (*USA v. Mexico*), RIAA IX, 1–14, 1902

Russian Claim for Indemnities (*Russia v. Turkey*), Permanent Court of Arbitration, 11 November 1912

Yuille, Shortridge and Co. (*UK v. Portugal*), award of 21 October 1861

4. International Criminal Courts and Tribunals

Kambanda v. Prosecutor, Case No. ICTR-97-23-A, Judgment (Int'l Crim. Trib. for Rwanda Oct. 19, 2000)

Prosecutor v. Blagojević & Jokić, Case No. IT-02-60-T, Judgment (Int'l Crim. Trib. for the former Yugoslavia Jan.17, 2005)

Prosecutor v. Bralo, Case No. IT-95-17-A, Judgment on Sentencing Appeal (Int'l Crim. Trib. for the former Yugoslavia Apr.2, 2007)

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998)

Prosecutor v. Musema, Case No. ICTR- 96-13-T, Judgment (Int'l Crim. Trib. for Rwanda Jan. 27, 2000)

Prosecutor v. Nikolić, Case No. IT- 02-60/1-S, Sentencing Judgment (Int'l Crim. Trib. for the former Yugoslavia Dec.2, 2003)

Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the former Yugoslavia July 15, 1999)

Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defense Motion on the Principle of *Non-Bis-In-Idem* (Int'l Crim. Trib. for the former Yugoslavia Nov.14, 1995)

Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision concerning Pre-Trial Chamber I's Decision of 10February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo (Int'l Criminal Court May 23, 2006)

Situation in Uganda, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of Pre-Trial Chamber II to Redact Factual Descriptions of Crimes from the Warrants of Arrest, Motion for Reconsideration, and Motion for Clarification (Int'l Criminal Court Oct. 28, 2005)

5. Iran-US Claims Tribunal

Aeronutronic Overseas Servs., Inc. v. Government of the Islamic Republic of Iran, 7 Iran-U.S. C.T.R., Award No. ITM 44-158-1 (Aug. 24, 1984)

American Bell Int'l, Inc. v. Islamic Republic of Iran, 9 Iran-U.S. C.T.R. 107 Award No. 255-48-3 (Sept. 19, 1986)

CMI International, Inc. v. Ministry of Roads and Transportation and Islamic Republic of Iran, 4 Iran-U.S. C.T.R Award No. 99-245-2 (Dec. 27, 1983)

Gould Mktg., Inc. v. Ministry of Defense of the Islamic Republic of Iran, 6 Iran-U.S. C.T.R. Award No. 136-49/50-2 (June 22, 1984)

Morgan Equip. Co. v. Islamic Republic of Iran, Award No. 100-28-2 (Dec. 27, 1983)

Questech, Inc. v. Ministry of National Defense of the Islamic Republic of Iran, 4 Iran-U.S. C.T.R. Award No. 191-59-1 (Sept. 25, 1985)

R.J. Reynolds Tobacco Co. v. Gov't of the Islamic Republic of Iran, 7 Iran-U.S. C.T.R. Award No. 145-35-3 (July 31, 1984)

6. International Investment Arbitration

Amco Asian Corporation and Others v. Indonesia, ICSID AKU/81/1, Award of November 20, 1984, 89 ILR (1992)

Asian Agricultural Products Limited v. Sri Lanka, ICSID ARB/87/3, Award, 27 June 1990

Canfor Corporation v. United States, Terminal Forest Products Ltd. v. United States (Consolidated NAFTA/UNCITRAL), Preliminary Question, 6 June 2006

Klöckner Industrie-Anlagen GmbH and others v. Cameroon, ICSID Case No. ARB/81/2, Decision on Annulment

MTD Equity Sdn. Bhd and MTD Chile S.A v. Chile, ICSID ARB/01/7, Award, 25 May 2004

Salini Costruttori S.p.A. and Italstrade S.p.A v. The Hashemite Kingdom of Jordan, ICSID ARU/02/13, Award, 31 January 2006

Sempra Energy International v. Argentina, ICSID ARB/02/16, Award, 28 September 2007

Sociedad Anonima Eduardo Vieira v. Chile, ICSID ARB/04/7, Award, 21 August 2007

Terniras Medioambientales Tecmed, S.A. v. Mexiro, ICSID ARE (AF)/00/2, Award, 29 May 2003

Waste Management v. Mexico (II), ICSID ARB(AF)/OO/3, Jurisdiction, 26 June 2002

7. Regional Courts

Advisory Opinion on Juridical Condition and the Rights of the Undocumented Migrants, IACtHR, OC-18/03 (17 September 2003)

Advisory Opinion on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, OC-16/99 (1 October 1999)

Case of Golder v. the United Kingdom, ECtHR Application no. 4451/70

Case of the Five Pensioners v. Peru, IACtHR Series C, No. 98 (28 February 2003)

Courage Ltd. v. Bernard Crehan, ECJ 20 September 2001, case C-453/99

Erich Stauder v. City of Ulm, [1969] ECR, Case 26/69

Johnston v. Chief Constable of the Royal Ulster Constabulary, 2 ECJ 15 May 1986, case 222/84

Yassin Abdullah Kadi and Al Barakaat international foundation v. Council of the European Union and ***Commission of the European Communities*** **(Joined Cases C-402/05 P and C-415/05 P) Judgment of 2 September 2008**

Mangold v. Helm, 6 ECJ 22 November 2005, case C-144/04

B. Evidence before international courts and tribunals

Mr. Aniruddha Rajput

Introduction:

1. The present paper proposes the inclusion of the topic 'evidence before international courts and tribunals' in the long-term programme of work of the International Law Commission.

2. Peaceful settlement of disputes is an obligation under Article 2.3 of the UN Charter and also a principle of customary international law.[1] International adjudication is one of the important ways of peaceful settlement of international disputes, as specified in Article 33 (1) of the UN Charter. Clarity and certainty of procedures would strengthen the international rule of law.

3. Evidence could play a determinative role in an adjudicative process. According to Sir Gerald Fitzmaurice, the outcome of international litigation may in fact "depend upon the accidents of large procedural or formal situations."[2] International courts and tribunals have to apply rules of international law to facts. Proving facts is therefore an essential part of adjudication proceedings: *idem est non probari non esse* (something which is not proven does not exist or is not true).[3]A resolution of a dispute is only possible if the adjudicating body identifies the facts appropriately and then applies legal principles to them.[4] Evidence is the method of proving facts.[5] This topic is limited to evidence of facts.

4. In the past, the resolution of factual controversies infrequently demanded attention and energy of international courts and tribunals. In most cases, facts would be admitted by the parties before hand and the courts or tribunals would have to simply apply the law. Even where there were factual disputes, they were relatively minor and could be addressed within the framework of legal interpretation, without the need to address factual controversies. The International Court of Justice (ICJ) rarely had to face cases involving complex and disputed facts, such as the *Corfu Channel case* or the *South West Africa case*. In recent times, this situation has changed. The ICJ has had to deal with complex documentary and oral evidence in the *Genocide Cases* and grapple with expert evidence in the *Whaling case*. The increasing workload of cases and the nature of cases brought reflect that factually complex and disputed cases would increase in future. Other courts and tribunals, such as Panels and Appellate Body of World Trade Organization (WTO) and human rights courts (African Court of Human and People's Rights, European Court of Human Rights and Inter-American Court of Human Rights) have been regularly dealing with complex factual issues.

---

[1] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgment of 26November 1984, [1984] ICJ Reports 14, p. 145 (para. 290).

[2] Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. 2, (Grotius Publications, 1986), pp. 575-8.

[3] *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Reports 4, pp. 15-6.

[4] Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law, 2009), p. 1.

[5] Ludes and Gilbert have given a general and useful definition of evidence in the following words: "Proof means any effort that attempts to establish the truth or fact, something serving as evidence, a convincing token or argument; the effect of evidence; the establishment of a fact by evidence; 'proof' is the result or effect of evidence, while "evidence" is the medium or means by which a fact is proved or disproved." FJ Ludes and HJ Gilbert (eds), *Corpus Juris Secundum: A Complete Restatement of the Entire American Law, Vol 31 A: Evidence* (West Publishing Company, 1964), p. 820.

5. The transformation of the nature of international disputes with the rise in factually complex disputes was highlighted by the President of the ICJ, Judge Higgins, in her address to the 58th Session of the International Law Commission. She said:

> The Court's docket increasingly includes fact-intensive cases in which the Court must carefully examine and weigh the evidence. No longer can it focus solely on legal questions. Such cases have raised a whole swathe of new procedural issues for the Court.[6]

The recognition of this transformation of the judicial function has been noted in the literature as well. In the words of Professor Franck:

> The ICJ is a trial court, as well as a court of last resort. It should strive mightily to resolve cases on the facts — credible findings of fact — and avoid to the greatest degree possible the temptation to mitigate the shortage of factual evidence, or lack of fact-analysis, by recourse to doctrines of law intended, wittingly or not, to bypass recourse to facts.[7] Need and importance of general rules of evidence:

6. The rules of international courts and tribunals and their constitutive instruments do not address evidence in detail. They make only a general reference to evidence in the form of timelines and presentation. They do not contain any reference to the kinds of evidence, presentation, handling, assessment and conclusions to be drawn from the evidence. Judicial practices of different courts and tribunals have developed rules of evidence that go beyond existing rules of international courts and tribunals. The areas to be covered under this topic (discussed in para. 10) would fill this void.

7. In the absence of rules of evidence, courts and tribunals have been relying on jurisprudence developed by each other.[8] This practice gives flexibility to the adjudicating body, but introduces uncertainty and inconsistency of the rules that are or would be applied. It would be a part of fair administration of justice that the parties to a dispute are aware, beforehand, which rules would be applied on evidence. Inconsistent application of rules of evidence would inevitably result in inconsistent outcomes although based on same pieces of evidence.[9] It would facilitate the work of all adjudicating bodies if the Commission would undertake this topic.

8. This topic should be limited to rules of evidence having general application There is agreement in the literature regarding the rules of evidence that have general application.[10]

---

[6] Speech by H.E. Judge Rosalyn Higgins, President of the International Court of Justice, at the 58th Session of the International Law Commission, 25 June 2006 (http://www.icj-cij.org/court/index.php?pr=1272&pt=3&p1=1&p2=3&p3=1).

[7] Thomas Franck, 'Fact-finding in the ICJ' in R Lillich (ed), *Fact-finding before International Tribunals* (transnational, Ardsley-on-Hudson, 1991), p. 32.

[8] WTO, *United States: Measures Affecting Imports of Woven Shirts and Blouses from India -Report of the Appellate Body* (25 April 1997) WT/DS33/AB/R; *Asian Agricultural Products Limited v. Republic of Sri Lanka*, 4 ICSID Reports, pp. 246, 272, 1990; *EDF (Services) Ltd. v. Romania, Award* of 8 October 2009, ICSID Case No. ARB/05/13, para. 221; Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007), pp. 35-82.

[9] There are instances of judges arriving at different conclusions based on the same material. For example in in the *DRC v. Uganda* case, Uganda made a counter claim against DRC (which was Zaire at that time) claiming that it was a victim of military operations carried out by hostile armed groups based in the DRC and tolerated by successive Congolese governments. The majority concluded that the absence by the Government of Zaire to take actions was tantamount to 'tolerating' or 'acquiescing' in the activities of the rebel groups. (at para. 301). Judge Kooijmans on the other hand, arrived at a different conclusion. He said: "But I have found no evidence in the case file nor in relevant reports that the Government in Kinshasa was not in a position to exercise its authority in the eastern part of the country for the whole of the relevant period and thus was unable to discharge its duty of vigilance before October 1996; the DRC has not even tried to provide such evidence." *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Reports 168 (Separate Opinion Judge Kooijmans).

[10] Shabtai Rosenne, *The Law and Practice of the International Court 1920-1996*, vol III, (Nijhoff, 1997), p. 1201; Hugh Thirlway, 'Procedural Law and the International Court of Justice' in Lowe and Fitzmaurice (eds) *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert*

Furthermore, the parameters applied for the kinds of proceedings to which these rules would apply (para. 12), would also guide in maintaining generality of the rules. The test of choice of rules of evidence on the basis of generality would ensure that the flexibility of institutional characteristics of different adjudication bodies is not interfered. To ensure generality of the outcome of this project and its acceptability outreach efforts (formal and informal) with international courts and tribunals could be undertaken from the early stages and throughout the progress of this project.

9. In addition to consistency in adjudicative process, the topic will also contribute towards avoidance of fragmentation in procedural law. If the issue of evidence (which is a matter of procedure) is left unattended, it would result into contradictory practices developing due to multiplicity of courts and tribunals and factual and technical complexities. A fractured system would result in inconsistent and incoherent decisions and erode the faith and confidence of States in the dispute resolution process.

Consideration of the topic by other bodies:

10. The Institut de droit international adopted 'rules of evidence in international adjudication' in 2004.[11] The exercise conducted by the Institut de droit international is pivotal and would be helpful in this study. It however has to be kept in mind that since the conclusion of the project, many developments have taken place in different areas of international law on evidence. Particularly, in the field of trade law, law of the sea and the jurisprudence of regional adjudicating bodies.[12] The International Bar Association (IBA) has developed the "IBA Rules of Evidence". They are frequently used in investment treaty arbitration and international commercial arbitration. Although not limited to, but in most of the cases where they are applied, they relate to commercial relationship. The work of the Institut de droit international and IBA would be helpful for this study. However, this would have to be done without forgetting their contexts and peculiarities. The International Law Association (ILA) has constituted a 'Committee on the Procedure of International Courts and Tribunals'. This Committee is studying rules of procedure generally and evidence is one of the sub-topics considered.[13] Needless to say, the Commission has access to States and thus can confirm the appropriateness and utility of its outcome based on the views of States. The outcome of this study would be an influential contribution of a substantial practical value. The need for the Commission to undertake this study has been made in the past by other independent expert bodies.[14] This topic is also one of the topics the Secretariat has put in the list of the six topics that need attention.[15]

11. In the past, the Commission has focused primarily on substantive issues of international law. The only occasion when the Commission worked on procedure was in 1958, when the Commission prepared Model Rules on Arbitral Procedure.[16] This should

---

Jennings, (Cambridge University Press,1996), p. 389; Chester Brown (n 8) [83-118]; Dr. Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, (Kluwer Law International, 1996); C.F. Amerasinghe, *Evidence in International Litigation*, (Martinus Nijhoff Publishers, 2005).

[11] Principles of evidence in international litigation", 70-I *Yearbook of the Institute of International Law* (Bruges), 2003, p. 138.

[12] Ibid., pp. 156-87; Preamble, Draft Resolution on the 'Principles of Evidence in International Litigation',70-I *Yearbook of the Institute of International Law* (Bruges), 2003, pp. 356-7.

[13] Committee Mandate, ILA Committee on the Procedure of International Courts and Tribunals, (http://www.ila-hq.org/index.php/committees), p. 1.

[14] *The Role and Future of the International Law Commission* (British Institute of International and Comparative Law, 1998); Vaughan Lowe, 'Future Topics and Problems of the international Legislative Process', in *The International Law Commission Fifty Years After: An Evaluation, Proceedings of the Seminar held to commemorate the fiftieth anniversary of the International Law Commission, 21-22 April 1998*, p. 130.

[15] ILC, 'Long-term programme of work: Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments — Working paper prepared by the Secretariat — Addendum', (31 March 2016), A/CN.4/679/Add.1, paras. 42-7.

[16] "Model Rules on Arbitral Procedure with a general commentary, 1958", *Yearbook of the International Law Commission, 1958*, vol. II, pp. 83-88.

not dissuade the Commission from exploring the present topic because the Commission possesses the necessary expertise. In addition to receiving views of States, the Commission could try to seek views of international courts and tribunals that regularly face these challenges. Also, other outreach efforts could be undertaken to get inputs from other professional bodies to enrich the work of the Commission. This would make the outcome of the project generally acceptable, useful and influential.

Scope of application of the work:

12. In order to keep the project manageable, following tests may be applied. These tests would ascertain in which proceedings the outcome of this project would apply. The three conditions could be as follows:

(a) At least one of the parties to the dispute should be a State:

The rules of evidence developed in this topic would apply in disputes where at least one of the parties is a State. This is a broad test to include situations where all or more than one of the parties to the dispute is a State. This would cover: inter-State disputes or disputes between natural or legal persons and States; and disputes brought before regional and global international courts and tribunals. A wide range of subject matters of dispute within international law would be covered under this test. Proceedings before international courts and tribunals that adjudicate upon individual criminal responsibility would be excluded, as a result of the first test. Since States are not parties to proceedings *per se*. Prosecutions of individuals for international crimes before international courts and tribunals should also be kept out of this project because the nature of these proceedings, standard and quality of proof, the extent of cooperation of States etc. are distinct. It may not be possible to take account of the nuances of these proceedings while addressing the present topic.

(b) At least one of the applicable laws should be international law:

In most inter-State disputes, public international law would be the applicable law. In disputes where one of the parties is a State, there is a possibility that other laws in addition to international law are applied. For example, the Iran-US Claims Tribunal applies a wide range of laws, such as commercial laws in addition to international law.[17] Article 42 of the ICSID Convention recognizes that the investment tribunal may apply international law, in addition to domestic law of the State that is party to the dispute.[18] The decisions of these courts and tribunals are based on international law and impact the existing body of international law. Keeping these courts and tribunals within the project would ensure that the chances of fragmentation are avoided. This criterion is necessary to exclude cases where States are parties but public international law is not applied. These are disputes arising out of commercial contracts entered into between States and legal and other persons. In these proceedings domestic law or conflict of laws are applied.

(c) Dispute resolution through adjudication (before international courts and tribunals):

In the present form of the project, it would be appropriate to limit the project to disputes resolved through judicial settlement i.e. resolved through adjudication before international courts and tribunals. It is possible that, based on the generality of the outcome, other bodies such as the Human Rights Committee or the Committee Against Torture or commissions of inquiry may use some parts of it. But, the project may become unmanageable if the rules of evidence are drafted keeping them in mind at present.

---

[17] Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic of Iran (Claims Settlement Declaration) (adopted 19 January 1981), art. 5: "The Tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances."

[18] Convention on Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966), 4 ILM 524 (1965) art. 42.

Areas to be covered under the present topic:

13. At this early stage, only a tentative list of areas to be covered in the present topic is presented. These are the principal areas that have regularly arisen before international courts and tribunals in the past and therefore could be focused upon in the present project.

(a) Introductory and general provisions:

The introductory provisions could address the background, object and context of the project. General provisions, such as equality of parties, in which situations evidence is necessary, disputed facts, etc. may be studied.

(b) Production of evidence:

Whether parties have the responsibility to produce evidence? Can the adjudicating body ask for evidence, and in which situations?

(c) Forms of evidence:

Different forms of evidence that could be presented by the parties and examined by the adjudicating body could be studied. The handling of documentary evidence, oral evidence, expert evidence and site visits (*descente sur les lieux*) could be some of the topics.

(d) Admissibility:

Whether there are rules of admissibility of evidence and, if so, which rules of admissibility could be applied?

(e) Exceptions to production of evidence:

Can there be exceptions to production of evidence, especially when requested by the other party or by the adjudicating body? Can an adverse inference be drawn in situations where a party to a dispute declines to produce the evidence?

(f) Burden of proof:

Areas such as onus of proof (*onus probandi incumbit actori*); shifting of burden of proof; standard of burden of proof; the party relying on exceptions should prove those exceptions (*reus in excipiendo fit actor*) and other rules may be studied.

(g) Presumptions:

Rules, such as, judicial notice, the judge knows the law (*jura novit curia*) and others could be studied further.

Methodology:

14. The outcome of the project would predominantly be based on rules, developed and applied in judicial practice, State practice and doctrine.[19] The topic has a close affinity to adjudication; hence, reliance on judicial practice is obvious and inevitable. Most of the rules of evidence would be drawn upon the jurisprudence of various international courts and tribunals. The level of reliance on one in comparison to another would depend on the qualitative and quantitative assessment of the material developed by them in certain areas. State practice has a symbiotic relationship with judicial practice in this area. In most cases, the rules of evidence applied by the courts and tribunals are based upon the arguments presented by the States in the judicial proceedings. States, in turn, have relied upon those rules in their pleadings before international courts and tribunals. Thus, developing continuity in the use of these rules. Pleadings of States before international courts and tribunals could constitute state practice.[20]With increased activity in adjudication, this area

---

[19] UNGA, 'Statute of International Law Commission, 1947', (21 November 1947) (http://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf), art. 15.

[20] Ian Brownlie, *Principles of Public International Law* (7th ed, Oxford: Oxford University Press, 2008), p. 10, Michael Akehurst, 'Custom as a Source of International Law' (1975) 47 British Yearbook of International Law 1, 4-5. Akehurst gives the example of *Mexican Railway Union Claim*, where the reply by the State was considered as the sole evidence of the rule in question. (1930 RIAA

has attracted scholarly writings. There is a sizable amount of literature on this topic. This would also be considered. It would be inappropriate and controversial to simply pick up some rules from domestic legal systems.[21] An appropriate course would be to use those rules that emanate from domestic legal systems but have been used and applied by international courts and tribunals. International courts and tribunals have been sensitive while making this choice to include rules of evidence originating from different legal systems, and particularly, the civil and common law traditions.

15. Some fundamental theoretical issues have to be kept in mind while working on this topic. These rules would apply to disputes involving sovereign States. These rules and their consequences cannot intrude into sovereignty of States contrary to general international law. Equality of parties in these proceedings is important, thus requiring good faith conduct of judicial proceedings. While taking account of all these theoretical considerations, the ultimate objective of administration of justice as a contributory factor towards the international rule of law cannot be forgotten. Administration of justice needs a special mention because, until now, States enjoyed great deal of discretion in choosing which and how much evidence to produce; and the international courts and tribunals enjoyed a great deal of discretion in dealing with that evidence. This flexibility may have been helpful in the past, but it consumes a lot of time and resources. Increase in judicial settlement demands streamlining of evidence and procedures for optimal use of time and resources. This is not only in the interest of States that are parties to ongoing disputes but also to those, which may wish to bring judicial proceedings in the future. A streamlined set of rules of evidence would increase the faith of States in the administration of justice.

The topic satisfies the conditions laid down by the Commission:

16. The Commission has applied three tests for the choice of topics: the 'topic should reflect the needs of States', the 'topic should be sufficiently advanced in stage in terms of State practice' and the 'topic is concrete and feasible'.[22] Firstly, this topic is of immense practical utility for States. As has been set out in the preceding paragraphs there is a significant rise in dispute settlement through adjudication between States or in cases where States are parties. Traditionally, procedural law has been a relatively neglected field in international law, in comparison to substantive law. As noted already, rules of procedure of international courts and tribunals do not address these requirements. There is a need for creating a general set of rules of evidence, which could be used in international adjudication. It will give clarity to States and certainly about the rules of evidence that would be applied in international adjudication. Secondly, the topic is in a sufficiently advanced stage, both in terms of State practice and judicial practice. There is adequate material available that can form the basis of rules. Lastly, the scope of the project as set out in para. 13 and areas of application set out in para. 12 above would ensures that the topic is neither too narrow nor too broad. The areas identified are concrete and feasible.

17. The progress of the project would depend on various factors; however, every effort could be made to cover the topic in three parts: a) introductory provisions and presentation of evidence; b) forms of evidence, admissibility and exceptions; c) burden of proof, presumptions and preamble. Each of these parts could be covered in a report respectively.

---

vol 5), 115, 122-4; Also see *Eschauzier claim* (1931) RIAA 207, 210-2; *Mergé Claim* (1955) ILR 22 443, 449-50; *re Piracy Jure Gentium* [1934] AC 586, 599-600.

[21] The caution to be exercised while relying on rules of procedures emanating in municipal law, the tribunal in the Parker case stated that: "As an international tribunal, the Commission denies the existence in international procedure of rules governing the burden of proof borrowed from municipal procedure."*William A Parker (USA) v. United Mexican States*, Award of 31 March 1926, (1951) 4 RIAA 35, 39. A note of action was articulated by Judge McNair in the South West Africa Cases in the following words: "The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules." *International Status of South West Africa*, Advisory Opinion, 11 July 1950, (1950) ICJ Reports 128, p. 148.

[22] (1997) II, part 2, Yearbook of the International Law Commission, p. 72, para. 238.

Conclusions:

18. Some reflections deserve to be made about the potential outcome of this topic. The General Assembly could note the outcome of this topic and commend it to States and others concerned. There are different alternatives of title for the outcome of the project. They could be 'rules', 'model rules', 'principles', 'conclusions' or 'guidelines'. The decision of the appropriate title could be taken once and as the Commission proceeds with the topic.

Bibliography

Legal instruments:

1. Convention on Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966), 4 ILM 524 (1965).
2. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic of Iran (Claims Settlement Declaration) (adopted 19 January 1981).
3. Dispute Settlement Understanding of the WTO.
4. Permanent Court of Arbitration Rules (adopted and entered into force 17 December 2012).
5. Permanent Court of International Justice, Revision of the Rules of Court, [1922] PCIJ Series D, No. 2, 210.
6. Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, (WTO, DSU) WT/DSB/RC/1(96-5267), 11 December 1996
7. Rules of Court, European Court of Human Rights (adopted and entered into force 14 November 2016).
8. Rules of Court, International Court of Justice (adopted 14 April 1978, entered into force 1 July 1978).
9. Rules of Procedure for Arbitration proceedings, International Centre for Settlement of Investment Disputes (adopted 25 September 1967, entered into force 1 January 1968) Rules of Court, European Court of Human Rights (adopted and entered into force 14 November 2016).
10. Rules of Procedure of the European Court of Justice (adopted 3 October 2012, entered into force 1 November 2012).
11. Rules of Procedure of the Inter-American Court of Human Rights (approved by the Court during its LXXXV Regular Period of Sessions, held from 16-28 November 2009).
12. Rules of Procedure of the Franco-German Mixed Arbitral Tribunal.
13. Rules of Procedure of the German-Belgian Mixed Arbitral Tribunal.
14. Rules of the Tribunal, International Tribunal for the Law of the Sea (adopted 17 March 2009).
15. Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 33 UNTS 993.
16. The 1907 Hague Convention for the Pacific Settlement of International Disputes (adopted 18 October 1907, entered into force 26 January 1910).
17. Tribunal Rules of Procedure, Iran-United States Claims Tribunal (adopted 3 May 1983).
18. United Nations Convention of Law of the Sea (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

ILC documents:

1. "Model Rules on Arbitral Procedure with a general commentary, 1958", *Yearbook of the International Law Commission, 1958*, vol. II.
2. ILC, 'Long-term programme of work: Possible topics for consideration taking into account the review of the list of topics established in 1996 in the light of subsequent developments — Working paper prepared by the Secretariat — Addendum', (31 March 2016), A/CN.4/679/Add.1.

Works of other bodies:

1. *Acts and Documents Concerning the Organization of the Court*, Judgment, [1926] PCIJ Series D, Addendum to No 2 Revision of the Rules of Court, p. 250.
2. British Institute of International and Comparative Law, *The Role and Future of the International Law Commission* (British Institute of International and Comparative Law, 1998).
3. Institut de droit internationale "Principles of evidence in international litigation", 70-I *Yearbook of the Institute of International Law* (Bruges), 2003.
4. International Court of Justice, Registry, United Nations Institute for Training and Research, A Dialogue at the Court: Proceedings of the ICJ/UNITAR Colloquium held on the occassion of the sixtieth anniversary of the International Court of Justice, at the Peace Palace on 10 and 11 April 2006 (The Hague International Court of Justice, Registry of the Court, 2007).
5. International Law Association Committee on the Procedure of International Courts and Tribunals, (http://www.ila-hq.org/index.php/committees).

Judicial decisions:

Permanent Court of International Justice:

1. Mavrommatis Jerusalem Concessions (*Greece v. Britain*), Reply of the Hellenic Government of 30 August 1927, (1927) PCIJ Series C No. 13-III.
2. *Payment in Gold of the Brazilian Federal Loans Contracted in France (France v Brazil)*, Judgment of 12 July 1929, (1929) PCIJ Series A No 21.
3. *Case of the Free Zones of Upper Savoy and the District of Gex (Switzerland v France)*, Merits, Judgment of 7 June 1932, (1932) PCIJ Rep Series A/B No 46.
4. *Legal Status of Eastern Greenland*, PCIJ (ser. A/B), No. 53 (5 April 1933).
5. *Lighthouses case between France and Greece (France v. Greece)*, Judgment on 17 March 1934, PCIJ Series A/B, No. 62 (1934).
6. *Case of the Diversion of Water from the River of Meuse (Netherlands v. Belgium)*, Merits, Order of 13 May 1937, (1937) PCIJ Series C, No. 81.
7. *The Diversion of Water from the Meuse (Netherlands v. Belgium)*, Oral Statements and Documents, Pleadings of June 28 1937, (1937) PCIJ Series A./B., No. 81.

International Court of Justice:

1. *The Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment of 9 April 1949, [1949] ICJ Reports 4.
2. *Anglo Iranian Oil Company case (United Kingdom v. Iran)*, Preliminary Objections, Judgment of 22 July 1952, [1952] ICJ Reports 93.
3. *South West Africa (Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, [1962] ICJ Reports 319 (Dissenting Opinion of Judge van Wyk).
4. *South West Africa Cases (Ethiopia and Liberia v. South Africa)*, Order of 29 November 1965, [1965] ICJ Reports 9.

5. *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Reports 64 (Separate Opinion of Judge Sir Gerald Fitzmaurice).

6. *Delimitation of the Maritime Boundary in the Gulf of Maine Area(Canada v. United States of America)*, Appointment of Expert, Order of 30 March 1984, [1984] ICJ Reports 165.

7. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, [1986] ICJ Reports 14.

8. *South West Africa Cases (Ethiopia and Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1986, [1986] ICJ Reports 6.

9. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Further Requests for the Indication of Provisional Measures, Judgment of 13 September 1993, [1993] ICJ Reports 407.

10. *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, Judgment of 1st July 1994, [1994] ICJ Reports 112.

11. *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovenia)*, Decision of the Court concerning Site Visit, Order of 5 February 1997, [1997] ICJ Reports 3.

12. *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovenia)*, Merits, Judgment of 25 September 1997, [1997] ICJ Reports 7.

13. *Kasikili/Sedudu Island (Botswana v. Namibia)*, Counter-Memorial of the Republic of Botswana, 28 November 1997.

14. *Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Preliminary Objections, Judgment of 25 March 1999, [1999] ICJ Reports 31.

15. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgment of 19 December 2005, [2005] ICJ Reports 168.

16. *Case of Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11th July 1996, [2006] ICJ Reports 595.

17. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order on 13th July 2006, [2006] ICJ Reports 113.

18. *Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, [2007] ICJ Reports 43.

19. *Territorial and Maritime Dispute between Nicaragua and Honduras (Nicaragua v. Honduras)*, Merits, Judgment of 8 October 2007, [2007] ICJ Reports 659.

20. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, ICJ Reports (2008).

European Court of Justice and European Court of Human Rights:

1. *Mirossevich v. High Authority* [1954-6] ECR 333.

2. *Chambre Syndicate de la Sidérurgie v. High Authority* [1960] ECR 281.

3. *X v. Audit Board* [1969] ECR 109.

4. *ICI v. Commission* [1972] ECR-II 619.

5. *Handyside v. The United Kingdom*, App No. 5493/72 (ECtHR, 7 December 1976).
6. *Ireland v. United Kingdom*, Judgment of 18 January 1978, ECtHR Series A, No. 25.
7. *Klass & Others v. Germany*, App Np. 5029/71 (ECtHR, 6 September 1978).
8. *Artico v. Italy*, Judgment of 13 May 1980, ECtHR Series A, No. 37.
9. *Société CdF Chimie Aztec et Fretilisants v. Commission* [1990] ECR-I 3083.
10. *Nijman v. Commission* [1991] ECR -II 699.
11. *Frederiksen v. Parliament* [1991] ECR-II 1403.
12. *Jabari v. Turkey*, App No. 40035/98 (ECtHR, 11 July 2000).
13. *Ipek v. Turkey*, App No. 25760/94 (ECtHR, 17 February 2004).
14. *Third Section Decision As To The Admissibility Of Application No.61603/00 by Waltraud Storck against Germany*, App No. 61603/00 (ECtHR, 26 October 2004).
15. *Giuliani and Gaggio v. Italy*, App No. 23458/02 (ECtHR, 24 March 2011).
16. *G. R. v. The Netherlands*, App No. 22251/07 (ECtHR, 10 January 2012).
17. *C. B. v. Austria*, App No. 30465/06 (ECtHR, 4 April 2013).
18. *Khodorkovskiy and Lebedev v. Russia*, App Nos. 11082/06 and 13772/05 (ECtHR, 25 July 2013).

Inter-American Court of Human Rights:

1. *Case of Velásquez-Rodriguez v. Honduras*, Reparations and Costs, Judgment of July 21, 1989 (Inter-American Court of Human Rights).
2. *Gangaram-Panday v. Suriname*, Merits, Reparations and Costs, Judgment of 21 January 1994 (Inter-American Court of Human Rights).
3. *Loayza-Tamayo v. Peru*, Merits, Judgment of 17 September 1997 (Inter-American Court of Human Rights).
4. *Case of Suárez-Rosero v. Ecuador*, Merits, Judgment of November 12, 1997 (Inter-American Court of Human Rights).
5. *Tradesmen v. Colombia*, Merits, Reparations and Costs, Judgment of 5 July 2004 (Inter-American Court of Human Rights).
6. *Apitz-Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of August 5, 2008 (Inter-American Court of Human Rights).
7. *Case of Escher et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment of July 6, 2009 (Inter-American Court of Human Rights).
8. *Case of Artavia Murillo et al. ("In Vitro Fertilization") v. Costa Rica*, Preliminary objections, merits, reparations and costs, Judgment of November 28, 2012 (Inter-American Court of Human Rights).
9. *Case of López Lone et al. v. Honduras*, Preliminary objections, merits, reparations and costs, Judgment of October 5, 2015 (Inter-American Court of Human Rights).

Iran-US Claims Tribunal:

1. *Flexi-Van Leasing Inc v. Iran* (20 December 1982), 1 IUSCTR 455.
2. *Richard Harza v. Iran* 1 Iran-USCTR 234.
3. *Richard Harza v. Iran* (23 February 1983), 2 Iran-USCTR 68.
4. *RN Pomeroy v. Iran*, Award No. 50-40-3 (8 June 1983), 2I USCTR 372.
5. *Chas T Main International v. Khuzestan Water and Power Authority of Iran* (27 July 1983), 3 Iran-USCTR 156.

6. *Behring International v. Iranian Air Force* (19 December 1983), 4 Iran-USCTR 89.

7. *International Technical Products Corporation v. Iran* (28 October 1985) 9 Iran-USCTR 10.

8. *Bechtel v. Iran* (4 March 1987), 14 Iran-USCTR 149.

WTO:

1. *Japan: Taxes on Alcoholic Beverages — Report of the Panel* (11 July 1996), WT/DS8/R WT/DS10/R WT/DS11/R.

2. *United States: Measures Affecting Imports of Woven Shirts and Blouses from India — Report of the Appellate Body* (25 April 1997) WT/DS33/AB/R.

3. *European Communities: Measures Concerning Meat and Meat Products (Hormones) — Report of the Panel* (18 August 1997), WT/DS26/R/USA.

4. *India: Patent Protection for Pharmaceutical And Agricultural Chemical Products — Report of the Appellate Body* (19 December 1997), WT/DS50/AB/R.

5. *European Communities: Measures Concerning Meat and Meat Products (Hormones) — Report of the Appellate Body* (16 January 1998), WT/DS26/AB/R, WT/DS48/AB/R.

6. *Argentina: Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items — Report of the Appellate Body* (27 March 1998), WT/DS56/AB/R.

7. *United States: Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Panel* (15 May 1998), WT/DS58/R.

8. *Australia: Measures Affecting Importantion of Salmon — Report of the Panel* (12 June 1998), WT/DS18/R.

9. *Indonesia: Certain Measures Affecting the Automobile Industry — Report of the Panel* (2 July 1998), WT/DS54/R, WT/DS55/R, WT/D59/R, WT/D64/R.

10. *Japan: Measures Affecting Agricultural Products — Report of the Panel* (27 October 1998) WT/DS76/R.

11. *Canada: Measures Affecting the Export of Civilian Aircraft — Report of the Appellate Body* (20 August 1999), WT/DS70/AB/R.

12. *Turkey: Restrictions on Imports of Textile and Clothing Product — Report of the Panel* (22 October 1999), WT/DS34/R.

13. *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products — Report of the Panel* (18 September 2000), WT/DS135/R.

14. *Japan: Measures Affecting the Importation of Apples — Report of the Panel* (15 July 2003) WT/DS/245/R.

15. *European Communities: Conditions for the Granting of Tariff Preferences to Developing Countries — Report of the Appellate Body* (7 April 2004), WT/DS246/AB/R.

16. *Korea: Taxes on Alcoholic Beverages — Report of the Appellate Body* (17 February 2009) WT/DS75/AB/R, WT/DS84/AB/R.

17. *United States: Measures Affecting Trade in Large Civil Aircraft (Second Complaint) — Report of the Panel* (31 March 2011) WT/DS353/R.

Other judicial decisions:

1. *Grisbådarna (Norway v. Sweden)* (1909) 11 RIAA 147.

2. *Hurt v. État allemand*, Franco-German MAT (1921), 1 TAM 98.

3. *Chamant v. État allemand*, Franco-German MAT (1921-2), 1 TAM 361.

4. *Compagnie d'Electricité de Sofia et de Bulgarie*, Bulgar-Belgium MAT (1923), 3 TAM 308.

5. *William A Parker (USA) v. United Mexican States*, Award of 31 March 1926, (1951) 4 RIAA 35.

6. *Island of Palmas Case (or Miangas), (United States v. Netherlands)*, (1928), 2 U.N. Rep. Int'l Arb. Awards 829.

7. *Mexican Railway Union Claim*, (1930 RIAA vol 5).

8. *William E. Bowerman and Messrs. Burberry's (Ltd.) (Great Britain) v. United Mexican States*, 15 February 1930, 5 RIAA 104 (GB-Mexico CC, 1930).

9. *Lillie S. Kling (USA) v. United Mexican States*, 8 October 1930, Vol 4 RIAA 575 (US-Mexico CC, 1930).

10. *John Gill (Great Britain) v. United Mexican States*, 19 May 1931, 5 RIAA 76 (GB-Mexico CC, 1930).

11. *Eschauzier claim*, 24 June 1931, (1931) RIAA 207.

12. *Re Piracy Jure Gentium* [1934] AC 586.

13. *Mergé Claim* (1955) ILR 22 443.

14. *Lighthouses Arbitration (Greece v. France)* (1956) 12 RIAA 155.

15. *Palena (Argentina v. Chile)* (1966) 38 ILR 10.

16. *Dispute on the Frontier between Boundary Post 62 and Mount Fitzroy (Argentina v. Chile)* (1966) 22 RIAA 3.

17. *Beagle Channel (Argentina v. Chile)* (1977) 52 ILR 93.

18. *S.A.R.L. Benvenuti & Bonfant v. People's Republic of Congo*, Award of 8 August 1980, ICSID Case No. ARB/77/2.

19. *Liberian East Timber Corporation v. Liberia*, Award of 31 March 1986, ICSID Case No. ARB/83/2.

20. *Société Ouest Africaine des Bétons Industriels v. Senegal*, Award of 25 February 1988, ICSID Case No. ARB/82/1.

21. *Asian Agricultural Products Limited v. Republic of Sri Lanka*, 4 ICSID Reports, 1990.

22. *Tariff Applied by Canada to Certain US-Origin Agricultural Products (United States v. Canada)*, 2 December 1996, CDA-95-2008-1 (NAFTA Ch 20 Panel 1996).

23. *The M/V 'SAIGA' (No. 20 (Saint Vincent and the Grenadines v. Guinea)*, Merits, Judgment of 1 July 1999, ITLOS Case No 2, (Separate Opinion of Wolfrum).

24. *Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, Award of 17 February 2000, ICSID Case No. ARB/96/1.

25. *Pope and Talbot Inc. v. The Government of Canada*, Decision by Tribunal of 6 September 2000, [2005] 7 ICSID Reports 99.

26. *Prosecutor v. Radoslav Branin and Momir Tali*, Decision on interlocutory appeal, ICTY Appeals Chamber, (11 December 2002), IT-9-36-AR73.9.

27. *Marvin Feldman v. Mexico*, 16 December 2002, ARB(AF)/99/1.

28. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 1 of 31 March 2006, ICSID Case No. ARB/05/22.

29. *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, Procedural Order No. 2 of 24 May 2006, ICSID Case No. ARB/05/22.

30. Case No. 2011-01.

Literature

1. A Riddell, *'Report on the Oral Proceedings in the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro): Selected Procedural Aspects'* (2007) 2 LJIL 414.

2. Andreas Reiner, *'Burden and General Standard of Proof'* (1994) 10 Arbitration International.

3. Andres Anguilar Mawdsley, *Evidence before the International Court of Justice Essays in Ronald St. John Macdonald (edn) Honour of Wang Tieya*, (Dordrecht, Boston and London, Martinus Nijhoff, 1994).

4. Anna Riddell and Brendan Plant, *Evidence before the International Court of Justice* (British Institute of International and Comparative Law, 2009).

5. C.F. Amaresinghe, *Evidence in International Litigation*, (Martinus Nijhoff Publishers, 2005).

6. Chester Brown, *A Common Law of International Adjudication* (Oxford University Press, 2007).

7. CN Brower, *'Evidence Before International Tribunals: the Need for Some Standard Rules'* (1994) 28 International Lawyer 49.

8. CN Brower, *'The Anatomy of Fact-finding before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence'*, R Lillich (ed), Fact Finding before International Tribunals (Transnational Publishes, 1992).

9. Durward V. Sandifer, *Evidence before International Tribunals*, (2nd edn, The Foundation Press, 1975).

10. E Valencia-Ospina, *'Evidence Before the International Court of Justice'* (1999) 4 International Law FORUM du droit international.

11. Gillian M. White, *The Use of Experts by International Tribunals* (Syracuse University Press, 1965).

12. Hudson, 'Visits by International Tribunals to Places Cornered in Proceedings', (1937) 31 AJIL 696.

13. Hugh Thirlway, 'Dilema or Chimeria? Admissibility of Illegally Obtained Evidence in International Adjudiction' (1984) 78 AJIL 622.

14. Hugh Thirlway, 'Evidence Before International Courts and Tribunals' in R Bernhardt (ed), *Encyclodedia of Public International Law*, vol 2, (Max Planck Institute for Compararive Public and Interational Law, 1995).

15. J F Lalive, *'Quelques remarques sur la preuve devant la cour permanente et la cour international de justice'* (1950) 7 *Schweizerisches Jahrbuch für Internationales Recht* 77.

16. J. C. Witenberg, 'La théorie des preuves devant les juridictions internationales' (1936-II) *56 Recueil des Cours 1*.

17. James Cameron and Stephen Orava, *'GATT/WTO Panels between Recording and Finding Facts' in Weiss (ed), Improving Dispute Settlement Procedures: Issues & Lessons from the Practice of Other International Courts & Tribunals*, (Cameron May, 2000).

18. Jochen Frowein, *'Fact-Finding by the European Commission of Human Rights'* in *Fact Finding before International Tribunals* (Richard Lillian (ed), 1991).

19. Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement', (2002) 51 ICLQ 325.

20. Keith Highet, 'Evidence and Proof of Facts' in Lori F. Samroscn, *The International Court of Justice At A Crossroads*, (Transnational Publishers, 1987).

21. Knisch P. '*On the Uncertainties Surrounding the Standard of Proof in Proceedings before International Court and Tribunals*' Venturini G and Bariatti S(eds) in *Liber Fausto Pocar*, Vol 1 (2009).

22. M Straus, 'The Practice of the Iran-US Clams Tribunal in Receiving Evidence from Parties and From Experts' (1986) 3 Journal of International Arbitration 57.

23. Malcolm N Shaw, Rosenne's Law and Practice of the International Court: 1920-2015 (5th edn, Brill: Nijhoff, 2017).

24. Markian Malskyy, *Adverse Inference in the WTO and the Practice of International Dispute Settlement Fora* (https://arzinger.ua/files/file/file_collection/en/0_Vyvod_v_pol_dr_st.pdf).

25. Markus Benzing, 'Evidentiary Issues' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press, 2012).

26. Michael Reisman and Eric Freedman, 'The Plaintiff's Dilema: Illegally Obtained Evidence and Admissbility in International Adjudication' (1982) 76 AJIL 737.

27. Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study on Evidence Before International Tribunals*, (Kluwer Law International, 1996).

28. NH Shah, 'Discovery by Intervention: The Right of a State to seize Evidence located within the Territory of the Respondent State' (1959) 53 AJIL 595.

29. R Teitelbaum, '*Recent Fact-Finding Developments at the International Court of Justice*' in (2007) 6 The Law and Practice of International Tribunals.

30. Richard Plender (ed), *European Courts: Practice and Precedents* (Sweet & Maxwell 1997).

31. Rosalyn Higgings, 'Respecting Sovereign States and Running a Tight Courtroom' (2001) 50 ICLQ 121.

32. Shabtai Rosenne, *The Law and Practice of International Court, 1920 to 2005* (Martinus Nijhoff Publishers, 2006).

33. Stefan Talmon, 'Article 43' in Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm and Christian Tams (eds), *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press, 2012).

34. Stewart Baker and Mark Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran-United States Claims Tribunal* (Kluwer Law and Taxation Publishers, 1992).

35. T Bernard, 'The Administration of Evidence in Countries of Civil Law' in P V Eijsvoogel (ed), *Evidence in International Arbitration Proceedings* (Graham & Trotman/Martinus Nijhoff, 1994).

36. Thomas Franck, 'Fact-finding in the ICJ' in R Lillich (ed), *Fact-finding before International Tribunals* (Transnational Pub Inc, 1991).

37. Tomka and Samuel Wordsworth, 'The First Site Visit of the International Court of Justice in Fulfilment of its Judicial Function', (1998) 92 AJIL 133.

38. V S Mani, *International Adjudication: Procedural Aspects*, (Martinus Nijhoff Publishers, 1980).

39. Vaughan Lowe, ''Future Topics and Problems of the International Legislative Process'', in *The International Law Commission Fifty Years After: An Evaluation, Proceedings of the Seminar held to commemorate the fiftieth anniversary of the International Law Commission, 21-22 April 1998.*